80-1687

No.

Office-Supreme Court, U.S.
FILED
APR 7 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WM. WARFIELD ROSS
WILLIAM R. WEISSMAN
BARBARA B. PRICE
WALD, HARKRADER & ROSS
1300 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel of Record

JOEL YOHALEM
1828 L Street, N.W.
Washington, D.C. 20036
(202) 862-4600

Attorneys for The Western Union Telegraph Company

Of Counsel:

JOHN D. APPEL
The Western Union
Telegraph Company
One Lake Street
Upper Saddle River,
New Jersey 07485

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the Federal Communications Commission's refusal to reject a tariff is final and thus reviewable, where the tariff patently fails to comply with threshold requirements established by the Commission's regulations and orders, and where the only affected user is left without adequate statutory remedy to redress substantial competitive injury resulting from implementation of the tariff.

PARTIES TO THE PROCEEDING

The following were parties in the proceeding in the United States Court of Appeals for the District of Columbia Circuit whose judgment is sought to be reviewed:

American Telephone and Telegraph Company

Federal Communications Commission

United States of America

The Western Union Telegraph Company

Western Union Corporation is the parent of petitioner The Western Union Telegraph Company.

The following firms are affiliated with The Western Union Telegraph Company:

Distronics Corporation

PR Newswire Association, Inc.

Telstat Systems, Inc.

Western Union Computer Utilities, Inc.

Western Union Data Services Company, Inc.

Western Union Electronic Mail, Inc.

Western Union of Hawaii, Inc.

Western Union Overseas, N.V.

Western Union Realty Corporation

Western Union Services, Inc.

Western Union Space Communications, Inc.

Western Union Teleprocessing, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	6
I. THE COURT OF APPEALS' RULINGS IN *AERONAUTICAL RADIO* AND IN THIS CASE RAISE AN IMPORTANT QUESTION OF EFFECTIVE JUDICIAL REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION	7
II. AS IN *AERONAUTICAL RADIO*, THE COURT OF APPEALS HAS MISCONSTRUED WELL ESTABLISHED PRINCIPLES OF REVIEWABILITY	9
CONCLUSION	13
APPENDICES	
APPENDIX A—Order of the United States Court of Appeals for the District of Columbia Circuit, filed Jan. 13, 1981	1a

TABLE OF CONTENTS—Continued

Page

APPENDIX B—Order of the United States Court of Appeals for the District of Columbia Circuit, filed Jan. 26, 1981 ..... 3a

APPENDIX C—Memorandum Opinion and Order of the Federal Communications Commission, released October 12, 1978 ..... 4a

APPENDIX D—Order of the Federal Communications Commission, released October 27, 1978 ..... 30a

APPENDIX E—Relevant Statutory Provisions..... 33a

TABLE OF AUTHORITIES

CASES: Page

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) 12
Aeronautical Radio, Inc. v. *FCC*, No. 77-1333 (D.C. Cir. June 24, 1980) 5, 9, 10, 11
Aeronautical Radio, Inc. v. *FCC*, No. 77-1333 (D.C. Cir. Nov. 5, 1980), *petitions for cert. filed*, 49 U.S.L.W. 3620, 3664 (U.S. Feb. 9, 1981, Feb. 20, 1981) (Nos. 80-1343, 80-1408) 5, 6, 7, 8, 9, 10, 11
AT&T, 52 F.C.C.2d 727 (1975), *aff'd without opinion sub nom. Carpenter* v. *FCC*, 539 F.2d 242 (D.C. Cir. 1976) 3
AT&T, 59 F.C.C.2d 163 (1976) 4
AT&T, 66 F.C.C.2d 9 (1977), *reconsideration denied*, 69 F.C.C.2d 1672 (1978), *remanded sub nom. MCI Telecommunications Corp.* v. *FCC*, 627 F.2d 322 (D.C. Cir. 1980) 7, 8
AT&T Offer of Facilities for Use by Other Common Carriers, 66 F.C.C.2d 1018 (1977) 4, 5
AT&T, 67 F.C.C.2d 1134 (1978), *reconsideration denied*, 70 F.C.C.2d 2031 (1979), *aff'd sub nom. American Broadcasting Cos.* v. *FCC*, No. 79-1261 (D.C. Cir. Oct. 9, 1980) 8
AT&T, 67 F.C.C.2d 1195 (1978), *reconsideration denied*, 70 F.C.C.2d 616 (1979) 8
AT&T, 67 F.C.C.2d 1236 (1978) 4
AT&T, 69 F.C.C.2d 724 (1978) 2
AT&T, 70 F.C.C.2d 1294 (1978) 2
AT&T, 74 F.C.C.2d 1 (1979), *reconsideration denied*, —— F.C.C.2d ——, FCC 81-73 (released March 4, 1981), *petition for review filed sub nom. Southern Pacific Communications Co.* v. *FCC*, No. 79-2212 (D.C. Cir., filed Oct. 10, 1979) 7, 8
AT&T, 74 F.C.C.2d 226 (1979) 7
Atchison, Topeka & Santa Fe Railway v. *Wichita Board of Trade*, 412 U.S. 800 (1973) 12

TABLE OF AUTHORITIES—Continued

Page

Bell System Tariff Offerings, 46 F.C.C.2d 413, *aff'd sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) 10

California v. *Southland Royalty Co.*, 436 U.S. 519 (1978) 10

FPC v. *Hunt*, 376 U.S. 515 (1964) 12

FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) 11

MCI Communications Corp. v. *AT&T*, 462 F. Supp. 1072 (N.D. Ill.), *aff'd per curiam on other grounds sub nom. AT&T* v. *Grady*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979) 11, 12

MCI Telecommunications Corp. v. *FCC*, 627 F.2d 322 (D.C. Cir. 1980) 7

Municipal Electric Utility Association v. *FPC*, 485 F.2d 967 (D.C. Cir. 1973) 3

Nader v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) 7, 12

Otter Tail Power Co. v. *FERC*, 583 F.2d 399 (8th Cir. 1978), *cert. denied*, 440 U.S. 950 (1979) 10

Papago Tribal Utility Authority v. *FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. ——, 101 S. Ct. 784 (1980) 5, 6, 8

Southern Railway v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) 6

Sun Oil Co., 18 F.P.C. 611 (1957), *aff'd sub nom. Sun Oil Co.* v. *FPC*, 266 F.2d 222 (5th Cir. 1959), *aff'd*, 364 U.S. 170 (1960) 10

Sunray Mid-Continent Oil Co. v. *FPC*, 364 U.S. 137 (1960) 10

Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978) 12

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 10, 11

Western Union International, Inc. v. *FCC*, No. 78-1697 (D.C. Cir. Nov. 18, 1980) 6

TABLE OF AUTHORITIES—Continued

	Page
Western Union Telegraph Co., 74 F.C.C.2d 293 (1979), *appeal pending sub nom. Western Union Telegraph Co.* v. *FCC*, No. 80-1045 (D.C. Cir., filed Jan. 11, 1980)	4
STATUTES:	
Communications Act of 1934, *as amended*	
Section 201, 47 U.S.C. § 201	2
Section 202, 47 U.S.C. § 202	2
Section 203, 47 U.S.C. § 203	2
Section 204, 47 U.S.C. § 204	2, 7
Section 205, 47 U.S.C. § 205	2, 7
Section 206, 47 U.S.C. § 206	2
Section 207, 47 U.S.C. § 207	2
Section 208, 47 U.S.C. § 208	2
Section 209, 47 U.S.C. § 209	2
Section 214(a), 47 U.S.C. § 214(a)	3
Section 402(a), 47 U.S.C. § 402(a)	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2342(1)	2
REGULATIONS:	
47 C.F.R. § 61.38 (1979)	2, 3, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Western Union Telegraph Company ("Western Union") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the court of appeals dated January 13, 1981 (Appendix A, *infra*),[1] and its amending order dated January 26, 1981 (Appendix B, *infra*), are not officially reported. The principal opinion and order of the Federal Communications Commission ("FCC") denying Western Union's petitions for rejection, suspension, and investigation and Western Union's petition for a declaratory judgment, released October 12, 1978 (Appendix C, *infra*)

---

[1] The appendices to this petition are cited as "Pet. App.".

is reported at 69 F.C.C.2d 724 (1978). The FCC released a "clarifying" order on October 27, 1978 (Appendix D, *infra*), which is reported at 70 F.C.C.2d 1294 (1978).

JURISDICTION

The judgment of the court of appeals was entered initially on January 13, 1981, but was amended and as amended was entered on January 26, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 201-209 and 402(a) of the Communications Act of 1934, *as amended*, 47 U.S.C. §§ 201-209, 402(a); 28 U.S.C. § 2342(1); and Section 61.38 of the Rules and Regulations of the FCC, 47 C.F.R. § 61.38 (1979), are set forth in Appendix E, *infra*.

STATEMENT

Prior to October 1, 1978, Western Union leased certain facilities from the American Telephone and Telegraph Company and its affiliates, the Bell System Operating Companies (collectively, "Bell"), under long-standing contractual arrangements. Western Union uses facilities leased from Bell to supplement its own system in providing common carrier communications services to customers throughout the United States, in direct competition with Bell.[2]

---

[2] Western Union is Bell's largest competitor and its only significant nationwide competitor in providing record (*i.e.*, non-voice) services to the public. In order to provide its services, Western Union must lease facilities from Bell, particularly "local loops" connecting Western Union's customers' premises to its interstate network.

Pursuant to notice by Bell, the Bell/Western Union contracts were scheduled to expire on September 30, 1978 (Pet. App. 6a). To replace the contracts, Bell proposed to apply to Western Union tariffs (the "Bell tariffs") that would increase Western Union's annual facilities leasing charges by an estimated $37 million, 150 percent above the contract rates (Pet. App. 17a-18a). Western Union petitioned the FCC to reject the Bell tariffs insofar as Bell sought to apply them to Western Union.[3] Western Union contended that the tariffs were unlawful on their face (1) because they did not comply with an extant FCC cease and desist order forbidding Bell from discriminating between its competitors and its interstate entity, AT&T Long Lines;[4] (2) because Bell had not submitted the cost support required by Section 61.38;[5] and (3) because the tariffs would effect a discontinuance of service in violation of Section 214(a) of the Communications Act, 47 U.S.C. § 214(a) (which requires prior Commission approval of discontinuance, reduction or impairment of service).[6]

---

[3] Some of the tariffs Bell sought to apply to Western Union were existing tariffs applicable to "Other Common Carriers" ("OCCs"). Although these tariffs were not newly filed, the Commission was required, under *Municipal Elec. Util. Ass'n* v. *FPC*, 485 F.2d 967, 974-76 (D.C. Cir. 1973), to assess the lawfulness of the rates contained in the tariffs at the time the contracts expired and the tariffs became applicable to Western Union. These rates had not been previously cost-justified because they were the product of a negotiated settlement between Bell and the OCCs in an earlier rate case. *See AT&T*, 52 F.C.C.2d 727 (1975), *aff'd without opinion sub nom. Carpenter* v. *FCC*, 539 F.2d 242 (D.C. Cir. 1976).

[4] *See* pp. 9-10, *infra*.

[5] Section 61.38, 47 C.F.R. § 61.38, requires that any tariff filing or tariff change be accompanied by economic data and information to support the changed or new matter, including an up-to-date cost of service study and projection of costs, and an estimate of the effects of the changed or new tariff upon the carrier's traffic and revenues.

[6] Certain wideband facilities available to Western Union under the contracts would no longer be available under the Bell tariffs. Bell's failure to comply with Section 214(a) was the subject of a

Western Union supported its argument within affidavits demonstrating that the effect of the Bell tariffs would be not merely a $37 million annual rate increase, but also immediate and long term competitive injury to Western Union caused by charges to Western Union that exceed Bell's charges to its own affiliates for identical services. Bell made no effort to controvert Western Union's showing.[7]

On September 27, 1978, the FCC denied Western Union's protests. It stated that it had "little alternative" but to apply the Bell tariffs to Western Union, in order to avoid (1) a charge of "unlawful discrimination" between Western Union and the OCC's, and (2) a rate hiatus as of October 1, 1978 (Pet. App. 22a-23a). The Commission also asserted that Western Union's interests would be adequately protected through pending investigations of Bell's rates. The Commission pointed to two docketed but wholly inactive investigations: Docket No. 20736, which concerns Bell's retail private line telegraph rates, and which had been dormant since 1976; and Docket No. 21499, a general investigation of Bell's rates for facilities offered to other carriers, in which no action had been taken beyond an initial order in 1977 (Pet. App. 20a-21a, 31a-32a).[8]

---

later Commission order, review of which is pending in the Court of Appeals for the District of Columbia Circuit. *See Western Union Tel. Co.*, 74 F.C.C.2d 293 (1979), *appeal pending sub nom. Western Union Tel. Co.* v. *FCC*, No. 80-1045 (D.C. Cir., filed Jan. 11, 1980).

[7] Western Union's affidavits demonstrated that, under many of the Bell tariffs, Western Union is required to pay more for parts of private line networks than Bell charges its retail customers for the *entire* network. Thus, to the extent Western Union attempts to pass through the Bell increases to its customers, in order to avoid an unprofitable service, it is priced out of the market.

[8] *See AT&T*, 59 F.C.C.2d 163 (1976), *AT&T*, 67 F.C.C.2d 1236, 1239 n.4 (1978); *AT&T Offer of Facilities for Use by Other*

Western Union promptly sought review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit. Because of related issues in this case and in *Aeronautical Radio, Inc.* v. *FCC*, No. 77-1333, which also was pending in that court, the two cases were argued together.[9]

The court decided *Aeronautical Radio* first. On June 24, 1980, the court of appeals held, *inter alia*, that the Commission had erred in refusing to reject the Telpak termination tariff at issue in that case. The court stated that the FCC had abused its discretion in waiving the cost data requirements of Section 61.38, because such data were important to assure informed public comment on a rate increase of the magnitude that would result from elimination of the Telpak offering. *See* ARINC Pet. App. 24-28.[10]

On November 5, 1980, the court reversed course. On rehearing, it concluded that the agency's failure to reject the Telpak termination tariff was unreviewable. The court stated that its earlier decision in *Papago Tribal Utility Authority* v. *FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. ——, 101 S. Ct. 784 (1980), and

---

Common Carriers, 66 F.C.C.2d 1018 (1977). Since its 1978 decision in this case, the Commission has taken no further steps to activate either of these rate investigations.

[9] *Aeronautical Radio* involved the FCC's refusal to reject Bell's tariff that eliminated its "Telpak" bulk offerings of private line services, which Bell also filed without any cost support data under Section 61.38 and without Section 214 authorization. Petitions for certiorari are now pending in this Court from the court of appeals' final decision in *Aeronautical Radio*. *See United States* v. *FCC*, 49 U.S.L.W. 3664 (U.S. Feb. 20, 1981) (No. 80-1408) ("U.S. Pet."); *Aeronautical Radio, Inc.* v. *FCC*, 49 U.S.L.W. 3620 (U.S. Feb. 9, 1981) (No. 80-1343) ("ARINC Pet.").

[10] "ARINC Pet. App." refers to the appendix to the petition for certiorari filed by Aeronautical Radio, Inc. and Air Transport Association of America in No. 80-1343.

this Court's recent decision in *Southern Railway* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) "require us to hold that the availability of a statutory complaint procedure [under Sections 206-09 of the Communications Act, 47 U.S.C. §§ 206-09] renders the FCC's acceptance decision in this case non-final" (ARINC Pet. App. 60-61).

On January 13, 1981, the court of appeals dismissed Western Union's review petition in the instant case by *per curiam* order in light of its November 5, 1980 ruling in *Aeronautical Radio* that "an agency decision allowing a tariff revision to become effective is unreviewable because it does not finally determine the lawfulness of the revised tariff" (Pet. App. 1a-2a).[11] In its brief order the court did not discuss the Commission's decision or the factual contentions and arguments raised by Western Union.

REASONS FOR GRANTING THE WRIT

The court of appeals' summary reliance on *Aeronautical Radio* in dismissing Western Union's petition shows that *Aeronautical Radio* will be applied broadly. Commencing with its sweeping dicta in *Papago*, and now in *Aeronautical Radio* and this case, the court below has made it clear that it will not review the FCC's refusal to reject a tariff filing, regardless of the grounds of the Commission's decision or the irreparability of injury to ratepayers, solely because the Communications Act provides for an independent complaint remedy. The court has thus abdicated all judicial authority over dispositive threshold determinations made by the Commission—determinations that are of particular importance when they involve the Bell System, which is the acknowledged

[11] The court also cited, but did not discuss, *Papago*, *supra*; *Western Union Int'l, Inc.* v. *FCC*, No. 78-1697 (D.C. Cir. Nov. 18, 1980); and *Southern Railway* v. *Seaboard Allied Milling Corp.*, *supra* (Pet. App. 1a). On January 26, 1981, the court amended its January 13th order to correct an erroneous transmittal number (Pet. App. 3a).

dominant force in the telecommunications industry. Because the court of appeals' refusal to review denials of such petitions denies to ratepayers important protections afforded by the Communications Act, this writ of certiorari should be granted.

I. THE COURT OF APPEALS' RULINGS IN *AERONAUTICAL RADIO* AND IN THIS CASE RAISE AN IMPORTANT QUESTION OF EFFECTIVE JUDICIAL REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION.

This case, with *Aeronautical Radio*, presents an important question of the proper role of the courts in fulfilling their statutory responsibility to oversee the FCC's regulation of the telecommunications industry—an industry that is unique in its dominance by one entity, the ubiquitous Bell System. The FCC's traditional rate investigation and prescription authority under Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204, 205, has not been used to control the rates Bell charges to its retail customers (as in *Aeronautical Radio*) and to its competitors (as in this case). The Commission's inability to use that authority to apply Communications Act standards to Bell's rates is notorious and of long standing. *See Nader* v. *FCC*, 520 F.2d 182, 205-07 (D.C. Cir. 1975); *MCI Telecommunications Corp.* v. *FCC*, 627 F.2d 322, 325, 340-46 (D.C. Cir. 1980).[12] For all practical purposes, whatever tariff rates Bell

---

[12] The Commission itself has expressed considerable frustration over its acknowledged inability to prescribe "just and reasonable" rates for Bell. *See AT&T*, 74 F.C.C.2d 1, 41-42, 47 (1979), *reconsideration denied*, —— F.C.C.2d ——, FCC 81-73 (released March 4, 1981), *petition for review filed sub nom. Southern Pacific Communications Co.* v. *FCC*, No. 79-2212 (D.C. Cir., filed Oct. 10, 1979); *id.* at 50-51 (separate statement of Commissioner Fogarty, dissenting); *AT&T*, 66 F.C.C.2d 9, 63 (1977) (separate statement of Commissioner Fogarty, concurring), *reconsideration denied*, 69 F.C.C.2d 1672 (1978), *remanded sub nom. MCI Telecommunications Corp.* v. *FCC*, 627 F.2d 322 (D.C. Cir. 1980); *AT&T*, 74 F.C.C.2d 226, 253 (1979).

files become the accepted rates, unless rejected at the threshold by the Commission *See id.* at 325.

Thus, to the extent that the FCC regulates Bell's rates, it does so in most cases by rejection of tariffs that fail to meet threshold requirements including, most importantly, prior Commission orders establishing guidelines and principles applicable to Bell's rates.[13] In this context, the court of appeals' blanket rule of nonreviewability assumes particular significance. If that rule stands, only Bell will have timely access to the courts to complain of the Commission's actions on threshold tariff issues—*i.e.*, when the Commission *rejects* a Bell tariff.[14] As we show in part II, *infra*, the limited after-the-fact complaint remedy is completely inadequate to protect against the injury caused by Bell's often unsupported or inadequately supported rate filings. When the Commission acts arbitrarily and in violation of its own statute and orders in *refusing* to reject a tariff, Bell's customers and competitors can be left without practical or effective redress.

Because the FCC's decisions on petitions to reject have evolved into such an important and frequently used tool to regulate Bell's rates, the effect of the decision below is to insulate from judicial review a major portion of the

---

[13] *See, e.g., AT&T*, 74 F.C.C.2d 1, 31 (1979) (MPL rates), *reconsideration denied*, —— F.C.C.2d ——, FCC 81-73 (released March 4, 1981), *petition for review filed sub nom. Southern Pacific Communications Co.* v. *FCC*, No. 79-2212 (D.C. Cir., filed Oct. 10, 1979); *AT&T*, 66 F.C.C.2d 9, 60-62 (1977) (WATS rates), *reconsideration denied*, 69 F.C.C.2d 1672 (1978), *remanded sub nom. MCI Telecommunications Corp.* v. *FCC*, 627 F.2d 322 (D.C. Cir. 1980); *AT&T*, 67 F.C.C.2d 1195, 1200-01, 1231-35 (1978) (DDS rates), *reconsideration denied*, 70 F.C.C.2d 616 (1979); *AT&T*, 67 F.C.C.2d 1134, 1135-36, 1157-59 (1978) (Series 7000 rates), *reconsideration denied*, 70 F.C.C.2d 2031 (1979), *aff'd sub nom. American Broadcasting Cos.* v. *FCC*, No. 79-1261 (D.C. Cir. Oct. 9, 1980).

[14] The court of appeals clearly regards orders *rejecting* rate filings as final orders and thus immediately reviewable by the courts. *See Papago, supra*, 628 F.2d at 241 n.16.

FCC's ratemaking orders. The court of appeals, in *Aeronautical Radio* and this case, has unwittingly opened up a substantial gap in the protections afforded to Bell's ratepayers under the Communications Act. For that reason, its decision should be reviewed here.

II. AS IN *AERONAUTICAL RADIO*, THE COURT OF APPEALS HAS MISCONSTRUED WELL-ESTABLISHED PRINCIPLES OF REVIEWABILITY.

The petitions for certiorari filed in *Aeronautical Radio* demonstrate that the court of appeals misconstrued applicable precedent in holding that "the Communications Act should be construed so as to preclude any judicial review of the FCC's refusal to reject a tariff filing patently in violation of applicable legal requirements" (ARINC Pet. at 21). Rather than repeat that discussion, we respectfully refer the Court to those petitions and describe briefly here the similarities between the two cases.[15]

First, here, as in *Aeronautical Radio*, the FCC failed to enforce important threshold requirements. One of these requirements was also at issue in *Aeronautical Radio*—Section 61:38 of the FCC's regulations, which the court of appeals properly characterized in its first decision in *Aeronautical Radio* as necessary "not only to provide the Commission with the information it needs to appraise tariff filings, but also to provide customers, competitors, and the public with that information so that they may intelligently participate in the Commission proceedings" (ARINC Pet. App. 25). As the United States points out in its petition in *Aeronautical Radio*, "[c]onsidering the very substantial consequences involved, it is . . . extremely difficult to justify the Commission's waiver of that rule . . ." (U.S. Pet. at 7).[16]

---

[15] *See* U.S. Pet. at 7-11; ARINC Pet. at 12-21.

[16] Here, the "substantial consequences" are a $37 million annual increase, the brunt of which is borne by only one customer (Bell's largest competitor), and irreparable competitive injury.

A second threshold standard (not involved in *Aeronautical Radio*) is the FCC's 1974 cease and desist order forbidding Bell from discriminating in rates, terms and conditions of service between AT&T's Long Lines Department (which provides service across state lines) and carriers that purchase facilities from Bell in order to provide service in competition with Long Lines. *Bell System Tariff Offerings*, 46 F.C.C.2d 413, 438-39, *aff'd sub nom. Bell Telephone Co.* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). Bell's compliance with that order is to be determined, not following protracted evidentiary hearings, but *when the rates are filed.* Western Union made an uncontroverted showing before the Commission that the Bell tariffs, on their face, discriminate against Western Union in favor of AT&T Long Lines in violation of that order—a showing totally ignored by the Commission (Pet. App. 17a-23a). The Commission's failure to enforce the order by rejecting the Bell tariffs is likewise "extremely difficult to justify."

Second, as in *Aeronautical Radio* (*see* ARINC Pet. at 15-16), the Commission's rationale for refusing to reject the tariffs raises a "purely legal" question that is properly reviewable now.[17] *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, 344

---

[17] As Western Union pointed out to the court below, the Commission's conclusion that it had no choice but to allow the Bell tariffs to go into effect as otherwise "there would be no applicable rates in any of the [Bell] tariffs for these services . . ." (Pet. App. 23a) rests on a faulty interpretation of the statutory scheme, which requires that the terms and conditions of service contained in an expired contract (including price) remain in effect until such time as they are replaced by *lawfully filed* tariffs, new contracts, or rates prescribed by the agency. *See California* v. *Southland Royalty Co.*, 436 U.S. 519, 525-26 (1978); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 155 (1960); *Otter Tail Power Co.* v. *FERC*, 583 F.2d 399, 409 (8th Cir. 1978), *cert. denied*, 440 U.S. 950 (1979); *Sun Oil Co.*, 18 F.P.C. 611 (1957), *aff'd sub nom. Sun Oil Co.* v. *FPC*, 266 F.2d 222 (5th Cir. 1959), *aff'd*, 364 U.S. 170, 173-74 (1960).

(1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 352-53, 355 (1956).

Third, in both *Aeronautical Radio* and this case, the statutory complaint remedy is patently inadequate to redress the injury suffered by Bell's customers. Because Western Union competes directly with Bell in offering communications services to the public, application of the Bell tariffs to Western Union has resulted in irrevocable shifts in competitive relationships between the two companies.[18] The permanent loss of customers by Western Union and the injury to its competitive viability and to the public interest imposed by the blatantly discriminatory rates are in part unquantifiable, and cannot be redressed on a retroactive basis under the Act's refund or complaint procedures, which were designed to redress overcharges suffered by *customers* rather than injury to *competitors*. *See MCI Communications Corp.* v. *AT&T*, 462 F. Supp. 1072, 1088 (N.D. Ill.), *aff'd per curiam on other grounds sub nom. AT&T* v. *Grady*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979). This Court has consistently recognized that the type of competitive injury Western Union faces here cannot be

---

[18] The competitive impact of the Bell tariffs is most clear as to services currently provided by Western Union that are essentially identical to services provided by Bell, such as private line channel services provided to the Federal Government or to commercial customers. The rate Bell charges its customers for those services effectively acts as a ceiling on the rates Western Union can charge for its competing offering. Although Western Union provides such services using primarily its own facilities, it is forced to supplement those facilities with Bell facilities in locations where Western Union lacks facilities of its own. In many instances, however, Bell's retail rate for the service for which Western Union would use the leased facilities is *less* than the wholesale facilities charge to Western Union under the Bell tariffs. Therefore, unless Western Union provides such competitive services at a loss, it will have to increase its retail charges substantially above those offered by Bell and thereby lose many of those customers to Bell.

adequately redressed by cumbersome, *post hoc* refunds or reparations proceedings. *See FPC* v. *Hunt*, 376 U.S. 515, 524 (1964); *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 640 (1978); *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800, 824 n.17 (1973) (plurality opinion); *accord*, *Nader* v. *FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975).[19]

In light of the FCC's clear abdication of its statutory responsibility and the inadequacy of post-implementation remedies under the Communications Act, we submit that "[t]his is . . . a case in which the impact of the [agency's action] upon the petitions is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967).

---

[19] In any event, the complaint remedy theoretically available to Western Union under the Communications Act is, as a practical matter, illusory. The "pending" investigations in which the FCC promised to consider the rates here at issue have not moved forward since 1977, and in all probability will continue to be totally inactive indefinitely. *See* p. 4 & n.8, *supra*. Thus, Western Union has no realistic expectation of obtaining meaningful relief absent prompt judicial review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WM. WARFIELD ROSS
WILLIAM R. WEISSMAN
BARBARA B. PRICE
WALD, HARKRADER & ROSS
1300 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 828-1200

Counsel of Record

JOEL YOHALEM
1828 L Street, N.W.
Washington, D.C. 20056
(202) 862-4600

Attorneys for Petitioner

Of Counsel:

JOHN D. APPEL
The Western Union
Telegraph Company
One Lake Street
Upper Saddle River,
New Jersey 07485

April 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 78-1955

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Intervenor

BEFORE: MacKinnon, Robb and Wilkey; Circuit Judges

ORDER

In view of our decision in *Aeronautical Radio, Inc.* v. *FCC*, No. 77-1333 (D.C. Cir. 5 Nov. 1980) (amending opinion filed on 24 June 1980), in which we held that an agency decision allowing a tariff revision to become effective is unreviewable because it does not finally determine the lawfulness of the revised tariff (slip op. 5-9), of our decisions in *Western Union International* v. *FCC*, No. 78-1697 (D.C. Cir. 18 Nov. 1980) (slip op. 14-20), and *Pagago Tribal Utility Authority* v. *FERC*, 628 F.2d 235 (D.C. Cir., *cert. denied*, 49 U.S.L.W. 344 (1980), and of the Supreme Court's decision in *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), we

find that the Commission's action in accepting Transmittal No. 12,714 is likewise unreviewable and that the Commission did not abuse its discretion in waiving Rule 61.38. The appeal is therefore, without prejudice,

DISMISSED.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 78-1955

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Intervenor

BEFORE: MacKinnon, Robb and Wilkey; Circuit Judges

ORDER

It is ORDERED by the Court, *sua sponte*, that this Court's order of January 13, 1981, is amended as follows:

From the last line on the first page delete
Transmittal No. 12,714

and substitute therefore
Transmittal No. 13,035 et al

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

Common Carrier, Rates, Cost Justification
Rules, Waiver Of
Tariff Revision, Cost Justification Of

Re interim OCC tariff revisions to expand telegraph grade facilities as approved by FCC staff under delegated authority, application for review denied—staff waiver of Sec. 61.38 (cost justification) held appropriate. Petitions for oral argument and rejection of tariff revisions denied. Tariff revisions incorporated into Docket 20736 investigation. DO 21499

FCC 78-691

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Transmittal No. 13035, *et al.*

IN THE MATTER OF
AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and BELL SYSTEM OPERATING COMPANIES

Docket No. 20736

REVISIONS TO THE AT&T LONG LINES DEPARTMENT
and BELL SYSTEM OPERATING COMPANIES

Docket No. 21499

INTERIM OCC TARIFFS TO REFLECT A NEW EXPANDED
OFFERING OF TELEGRAPH GRADE FACILITIES

MEMORANDUM OPINION AND ORDER

(Adopted: September 27, 1978;
Released: October 12, 1978)

BY THE COMMISSION: COMMISSIONER BROWN ABSENT.

1. During June and July of this year, the American Telephone and Telegraph Company, Long Lines Depart-

ment (AT&T) and the 19 Bell System Operating Companies (collectively BOCs) filed the instant tariff revisions establishing rates and regulations for telegraph grade facilities primarily to meet the facility requirements of The Western Union Telegraph Company (WU). Prior to filing, they requested and were granted waivers of certain Sections of Part 61 of the Rules. Specifically, Sections 61.38 (which requires cost justification); 61.55 (which requires clear and precise terms); 61.58 (notice requirements); and 61.74 (which prohibits cross-referencing to other tariffs), 47 C.F.R. §§ 61.38, 61.55, 61.58 and 61.74. These tariff revisions were collectively filed by the BOCs under various Transmittals on June 30, 1978, and by AT&T under Transmittal No. 13035 on July 27, 1978. (See Appendix). All of these revisions are scheduled to become effective on October 1, 1978.

2. The tariff filings in question involve rates for an expanded offering of telegraph grade facilities currently offered in the interim Other Common Carrier (OCC) facility tariffs. These telegraph grade facilities are presently available to all OCCs at the same rates but only within the International Record Carrier (IRC) gateway cities, i.e. New York, Washington, D.C., San Francisco, New Orleans and Miami. These tariff filings simply extend this offer of telegraph grade facilities nationwide. On September 30, 1978, AT&T's provision of telegraph grade facilities to WU under existing Exchange of Facilities Contracts (Contract Nos. 1 and 2)[1] will terminate

[1] Contract No. 1 provides for the leasing of circuit facilities *within* exchange areas and Contract No. 2 provides for the leasing of circuit facilities *between* exchange areas. Facilities currently provided under these contracts are used by WU principally in conjunction with Telex, private line and public message telegram and Mailgram services. Teletypewriter Exchange (TWX) Service, on the other hand, is provided by WU primarily over facilities, including switches, provided by AT&T under another contract (Contract No. 5) which apparently is still in effect.

and it appears the instant tariff modifications will place WU in the same position, vis-a-vis the Bell System, as are all other OCCs.

3. Before us for consideration are various opposition pleadings filed by WU concerning these tariff modifications. Specifically, WU has filed (a) Petitions to Reject and Petitions to Suspend AT&T's tariff revisions; (b) a Petition for a Declaratory Order; (c) a Motion to Present Oral Argument; and (d) an Application for Review of the Common Carrier Bureau's grant of AT&T's Special Permission Nos. 9026, 9027 and 9059. AT&T has filed oppositions and replies to the above pleadings. Essentially, the present controversy concerns the offering of telegraph grade facilities to WU under the interim OCC facility tariffs and the coincident increase in the rates to WU formerly obtained under Contract Nos. 1 and 2.

Background

4. The WU-AT&T exchange of facilities arrangements pre-date the Communications Act of 1934. The first of the agreements covering the lease of facilities between WU and AT&T was signed in 1909. These reciprocal agreements provided for the lease of certain communications facilities which were used by WU in providing its services to the public at fixed rates. The Contract Nos. 1 and 2 currently in force became effective in January of 1970. During the autumn of 1973, AT&T notified WU that it was invoking the five-year termination clause in these contracts, thus making them due to expire on September 30, 1978. There have been other proceedings before this Commission which have permitted the WU-AT&T contracts as they relate to the offering of entrance, intercity and local distribution facilities to remain in effect. Before proceeding to discuss the instant tariff filings, we believe a brief summary of these previous proceedings would be helpful.

5. In November of 1973, AT&T filed tariffs offering access facilities to the domestic satellite carriers and local distribution facilities to all the specialized carriers. These tariffs were allowed to take effect pending our final action in Docket 19896, *Bell System Tariff Offerings*, 44 FCC 2d 245 (1973). On April 23, 1974, we released our Decision in Docket 19896, 46 F.C.C. 2d 413 (1974), which in pertinent part, concluded that AT&T was required to establish physical connections for local distribution with the specialized common carriers by tariffs filed with this Commission, rather than the state regulatory Commissions. We also held that AT&T could not avoid its contractual obligations to WU by the unilateral act of filing a tariff, and we rejected AT&T's tariffs to the extent this was done. On May 3, 1974, AT&T filed further tariffs and revisions to these November 1973 tariff filings to comply with this decision. As a result of these filings, on July 5, 1974, we instituted a general investigation in Docket 20099[2] into the tariffs and revisions filed by AT&T for the interconnection of its facilities with the OCCs. Subsequently, on August 1, 1974, the BOCs each filed revised tariffs setting forth the rates and regulations applicable to their furnishing local distribution facilities to the OCCs. Following extensive negotiations from November 1974 until March 1975, a Joint Motion was filed in which the parties sought our acceptance of a Settlement Agreement[3] which compromised differences between the parties and formalized the agreed upon terms and conditions by which AT&T would provide interconnected facilities to the OCCs. We accepted the Settlement Agreement in order to end the controversy and we granted the appropriate authorizations, including waivers of Sections of Part 61 of the Rules, which enabled the parties to implement the Agree-

---

[2] *AT&T*, 47 FCC 2d 660 (1974). *Modified* 49 FCC 2d 729 (1974).

[3] *AT&T*, 52 FCC 727 (1975).

ment. This Agreement recognized that the reduced OCC tariff rates would not be cost justified until some future date. Until such justification was provided, the interim negotiated rates would be applied to the OCC facilities.[4] At that time, we reaffirmed our previous holding in Docket 19896 *supra* that AT&T could not avoid its contractual obligations to WU under its existing contract by unilaterally filing a tariff. *See* para. 4, 52 FCC 2d at 740.

5. We subsequently investigated Contract Nos. 1 and 2 as they pertained to the provision of foreign exchange (FX), common control switching arrangements (CCSA) and domestic satellite service[5] and concluded that the contracts did not include an offering of these services. Therefore, relying on Docket 19896 *supra*, we required WU to pay for those facilities at the same interim rates which AT&T applied to the other OCCs, not the contract rates. As a result of Docket 20099, we also investigated the IRC-AT&T contracts by which intercity and entrance

---

[4] These rates were established as follows:

> The Settlement Agreement provides for establishment of reduced OCC facility tariff rates reflecting a thirty percent reduction from rates effective August 2, 1974 for intra-exchange voice grade and wire pair facilities and a twenty-one percent reduction from the rates effective August 2, 1974 for interexchange voice grade facilities within a single state and wholly within an area comprising all those exchanges whose rate centers are forty miles or less from the rate center applicable to the OCC terminal locations. In accordance with the Settlement Agreement, these reduced rates will be effective retroactively to December 1, 1974 . . .

52 FCC 2d at 734. These interim rates have been in effect since December 1, 1974, and the AT&T post-interim cost supported OCC rates are now scheduled to be filed on or about December 1, 1978.

[5] *Western Union Tel. Co.*, 49 FCC 2d 321 (1974); *recon. denied*, 53 FCC 2d 1045 (1975); *aff'd sub nom., WU* v. *FCC*, 541 F.2d 346, (3rd Cir. 1976; *cert. denied*, 429 U.S. 1092 (1977).

facility interconnecting arrangements were provided to the IRCs in the gateway cities, *IRC's*, Docket 20452, 63 FCC 2d 761 (1977); *recon. denied* 66 FCC 2d 517 (1977); *aff'd sub nom. Western Union International, Inc.* v. *F.C.C.* 568 F.2nd 1012 (2d Cir. 1977); *cert. denied* U.S.—(No. 77-1318) June 5, 1978. Our investigation confirmed that AT&T was providing entrance and intercity facilities to the IRCs on different terms and conditions by those contracts than they were providing the other OCCs under the interim tariffs. We found this to be an unjustified discrimination in the provision of like communications services in violation of the Act and ordered AT&T to eliminate the discrimination. We noted that:

> . . . In the event facilities are offered to the IRCs on the identical terms and conditions as are given other carriers, we shall waive the Section 61.38 requirement until such time as AT&T files full justification for the various OCC facility offerings. In any event, within 30 days of the publication of this decision in the Federal Register, AT&T and the Bell System Operating Companies shall file a letter with the Commission giving a date certain for the filing of such full justification.

63 FCC 2d at 767. As a result, AT&T chose to eliminate the discrimination by filing modifications to its interim OCC tariffs on May 26, 1977 and applying these rates to the IRCs. Despite IRC objections, we allowed these tariff changes to take effect.

WU's Petition to Reject

7. WU has requested the rejection of both the BOCs' tariff revisions and AT&T's tariff revisions on grounds that the filings are *prima facie* unlawful. It contends that (1) these filings fail to comply with Section 203(b)

of the Act[6] and Section 61.38 of the Commission's Rules; (2) the revisions are ambiguous and, as a result, violate Sections 61.55(f), (g) and (h) of the Rules; and (3) the revisions discontinue services now offered to WU by inter-carrier contract in violation of Section 214(a) of the Act.[7] Since these arguments and pleadings are closely interrelated and refer to similar tariff revisions, we will treat them collectively.

8. WU submits that the lack of Section 61.38 support information in these filings stems from the Bureau's Special Permission grants which waived this requirement. At this point, WU states that the Bureau's action is apparently dispositive of its contention with respect to rejection. However, WU states that it seeks Commission review of that Bureau action.

9. WU further contends that the tariff modifications violate Section 61.55 (which prohibits vague and ambiguous terms in a tariff) because the revisions contain a separate offering of cable pairs facilities under five

---

[6] This Section, as amended August 4, 1976, provides for a maximum 90-day notice period before changes in filed tariffs become effective. Presumably, WU's reference to this Section is in regard to the Bureau's waivers of Section 61.58 in its grant of Special Permission No. 9059 to AT&T to file its revisions on 60 days' notice rather than 90. The BOC filings, which are essentially the same, were made on full 90 day notice. The waiver was necessary to have the BOC and AT&T tariff revisions coincide with the scheduled October 1, 1978 termination of Contract Nos. 1 and 2; otherwise there would not have been rates on file by which AT&T could offer this service. Since this contention is not pursued by WU beyond this limited reference, we will not discuss it further. It suffices to say that WU has not shown any prejudice as a result of this waiver since the AT&T filing was largely identical to the BOC filings and thus did not raise any new issues.

[7] Section 214 requires certification from the Commission before services authorized under the Act can be discontinued, reduced or impaired to any community.

miles which apparently overlaps a similar offering contained in the existing interim OCC tariffs. As a result, WU states, it is unable to ascertain the import of the proposed revisions vis-a-vis the existing OCC tariffs. Further, WU argues that these language deficiencies could allow AT&T to apply its tariffs differently under identical circumstances and present an opportunity for the discriminatory treatment of different customers.

10. Moreover, according to WU the interim OCC tariffs do not offer all the services contained in the existing contracts such as long distance wire pair facilities and if permitted to take effect, could result in discontinuance, reduction or impairment of service to customers in violation of Section 214(a) of the Act. For example, WU states that the interim OCC tariffs do not assure that wire pair facilities for distances in excess of five miles will continue to be available. In addition, it contends that telegraph grade facilities under the OCC tariff can be offered as either energized or unenergized wire pairs at the option of the Bell System, which could result in its present unenergized terminal equipment being rendered incompatible with the Bell System interface requirements. Citing further examples, WU submits the new telegraph grade service is also limited to facilities of 75 baud and under and no revision has been made for WU's customers using facilities of above 75 baud. Finally, WU contends that after the expiration of Contract Nos. 1 and 2, no provision will exist in the interim OCC tariffs to continue WU's ability to obtain services like "active" bridges [8] and interexchange circuits for emergency purposes. For these reasons, WU asks the Commission to reject the AT&T tariff revisions.

---

[8] As we understand this term, it enables WU customers to join several low-speed telegraph channels into a single voice grade facility.

AT&T's Response

11. In response, AT&T first states that the Bureau's waiving of certain sections of Part 61 of the Rules is in keeping with all its previously filed revisions concerning the interim OCC tariffs. This filing simply involves an expanded offering of telegraph grade facilities in those existing tariffs. The rates are set in the same manner as are all the other interim rates agreed to by the parties to the Settlement Agreement. This Agreement, AT&T submits, was found to be in the public interest and accepted by the Commission in Docket 20099. WU was a party to that Agreement but now seeks, in AT&T's words, ". . . to be saved harmless from the effect of being brought more completely into the world of Other Common Carriers". After five years' notice, AT&T says, WU still seeks to continue to pay rates for telegraph grade facilities which are different than the rates being paid by the other OCCs. In an almost identical situation, AT&T states, the Commission rejected similar arguments of the IRCs, who also objected to paying for facilities pursuant to the interim OCC tariffs after the termination of their facility contracts with AT&T. AT&T contends that telegraph grade facilities are currently available to all OCCs at the interim OCC rates within the IRC gateway cities, and its tariff revisions simply extend these facilities nationwide at these same interim rates thereby placing WU in the same position with the Bell System, as are all other OCCs.

12. The filing of tariffs to expand its offering of facilities in the OCC tariffs to accommodate needs of OCCs, formerly satisfied under contract, AT&T explains, and the concomitant waiver of Section 61.38 has been the past practice authorized by the Commission and is fully justified in this instance. Citing specific cases, AT&T states that on more than 50 occasions since May of 1975, interim OCC tariff filings have been made pursuant to

waivers of Section 61.38 with WU's full knowledge. AT&T indicates that it is inconceivable that WU is now "surprised" by the Bureau's waiver of this requirement. In spite of the valid exercise of the termination clauses contained in Contract Nos. 1 and 2, according to AT&T, WU still contends that it should be obligated to only pay the contract rates until the interim OCC facility rates have been supported and accepted by the Commission. AT&T states that this reasoning is unsound because it has no choice in light of past Commission policy, but to apply interim OCC rates to telegraph grade facilities when its contracts with WU expire. It cites the Commission's recent ruling in *Midwestern Relay Company*, FCC 78-560, Docket 20801, released August 7, 1978; and Docket 20452 *supra*.

13. In response to WU's other argument that the tariff revisions are not clear enough to comply with Section 61.55 of the Rules, AT&T states that it is unable to discern the unexplained "overlap" in the offering of wire pair facilities or its effect on WU. If WU discloses its problem with the tariff language, AT&T contends a resolution of this difficulty will be possible. Similarly, WU's vague reference to AT&T's "opportunity" for the discriminatory application of the tariff revisions is also unexplained. If and when WU perceives actual discrimination in the future, AT&T suggests that relief may be sought by WU under other sections of the Communications Act.

14. WU's argument concerning a possible violation of Section 214 is misdirected, AT&T states, because no facilities provided to WU under the existing contracts will be discontinued in the tariff. These apprehensions are unfounded it states, referring to the affidavit of Curtis R. Peck, which sets forth a full explanation of what facilities will be made available to WU under the interim OCC tariff revisions. The effect on WU will simply be a rate increase, AT&T submits, not a discontinuance of service within the meaning of Section 214.

WU Petitions to Suspend and Investigate

15. WU also requests the alternative relief of a suspension of the AT&T tariff revisions for the full five month statutory period and an investigation into the lawfulness of these revisions. As the basis for this request, WU again suggests that the failure of AT&T to supply supporting cost and revenue information pursuant to Section 61.38, precludes the Commission from determining the lawfulness of the proposed revisions. It then states there is strong evidence that these rates are unjust, unreasonable and clearly discriminatory and if the Commission fails to investigate the revisions, it would be an abuse of discretion. Moreover, WU urges that the substantial adverse impact of such unsupported revisions on WU mandates the full five month suspension.

16. Supporting these allegations, WU cites previous testimony of AT&T witnesses in an earlier domestic telegraph investigation (Docket 14650) that suggests the rates AT&T was charging WU in the mid-1960s, under then existing Contract Nos. 1 and 2, were fully cost supported. From this, WU reasons that these same contract rates were generally renegotiated downward in 1970. WU states that those lower changes were generally in accord with cost trends for circuitry during that period. Following this line of logic, it compares other financial data submitted by AT&T in other Commission proceedings which, it suggests, shows a general decline in the costs of telecommunications facilities. The rates proposed in the pending revisions appear to be excessive, WU concludes, in light of these admitted cost decreases.[9] Absent

---

[9] WU indicates that its annual costs for intraexchange facilities now provided under Contract No. 1 would be increased by some $15 million annually, from $10 million to $26 million, and the interexchange facilities leased from AT&T under Contract No. 2 would increase its costs some $20 million, from approximately $14 million to $34 million.

any evidence that the existing contract rates are other than cost supported, which can only be accomplished through AT&T's filing of Section 61.38 data, WU submits that the OCC tariff rates must be considered unjust and unreasonable.

17. WU urges that the unsupported interim OCC tariff rates are purported by AT&T to be equal to the BOC intrastate rates for telegraph grade service which are also unsupported in the various state jurisdictions. The same BOC rates apply to both multipoint service and two point service, even though multipoint services are generally more expensive to provide than the two point service. Therefore, it states that the rates for two point service must be considered excessive. As another example of the unlawfulness of AT&T's action, WU submits a table which generally compares the various OCC tariff rates for telegraph grade service with the AT&T rates for private line telegraph services in six states. It contends that this indicates a wide disparity among the OCC rates from state-to-state without any justification explaining the differences. Therefore, it concludes that the interim OCC tariff rates appear to also be unlawfully discriminatory.

18. WU then challenges AT&T's reliance on the Settlement Agreement for establishing the proposed telegraph grade rates in the OCC tariffs. First, WU states that the Settlement Agreement provided for reduced rates for voice grade facilities and did not establish any rates for telegraph grade facilities. These voice grade rates were then negotiated among the participating OCCs, but the rates applicable to telegraph grade facilities were established entirely outside that agreement. WU contends it has never agreed to the rates for telegraph grade service proposed in the interim OCC tariffs and AT&T's claim that the proposed rates are based on the same principles embodied in that Agreement, which it must apply to WU, is untenable. For these reasons, WU contends that the

unsupported interim rates are unjust and unreasonable, and it requests suspension and investigation of the AT&T tariff revisions.

AT&T's Response

19. In its response AT&T concedes that the interim OCC rates are not cost-based, but are negotiated rates embodied in the Settlement Agreement, which was accepted by the Commission and signed by WU. The rates set forth in Contract Nos. 1 and 2 are also negotiated rates and the effect of applying these rates will be, in essence, to substitute negotiated rates for negotiated rates, neither of which have been cost supported. AT&T hastens to add that it plans to file cost supported post-interim OCC tariff rates on December 1, 1978 to become effective in June of 1979. In addition, the Commission has instituted a proceeding to investigate the interim OCC rates, *AT&T* Docket 21499, 66 FCC 2d 1018 (1977)[10] and, AT&T submits, WU is a full participant in that proceeding. Therefore, it argues that the additional investigation WU seeks of these rates is unnecessary.

20. Further, AT&T urges that variations in the OCC interim rates from state-to-state are traceable to the Settlement Agreement itself, and WU's contention that the OCC interim rates are unlawfully discriminatory because they are not the same as existing private line rates can be explained. This occurred, according to AT&T, when interim OCC tariff rates for facilities wholly within a state were negotiated to be equal to the private line service rates in that state in 1974 and were then frozen at that level. It indicates that changes have occurred, both increases and decreases, in the various intrastate private line rates since the Settlement Agreement and these

---

[10] The Docket 21499 proceeding resulted from the AT&T-IRC investigation in Docket 20452 *supra*, in which we stated that an investigation into the lawfulness of AT&T's facility offerings to the OCCs would be instituted. *See* FCC 77-674 at para. 40.

changes have not been reflected in the interim OCC tariffs. When the Contract Nos. 1 and 2 expire, WU will be in the same position as the other OCCs, i.e., each may obtain voice-grade facilities at discounted rates within exchanges and between exchanges up to 40 miles. All other facilities are offered at the interim OCC tariff rates set at 1974 levels pursuant to the Settlement Agreement.

WU Petition for a Declaratory Order

21. Briefly, WU petitions the Commission to issue a Declaratory Order to terminate this controversy between it and AT&T. The controversy involves the legal status of the Interim OCC Facilities Tariffs filed by the AT&T in 1975, insofar as AT&T intends to apply those tariffs, with or without the revisions pending before the Commission, to the facilities leased by WU after the expiration of Contract Nos. 1 and 2. WU requests the Commission (1) to rule that the Bell System may not apply the interim OCC tariffs to WU when these contracts expire, (2) to direct AT&T to preserve the status quo (a) as to rates, until new rates are implemented in accordance with Section 203 to 205 of the Act, and Part 61 of the Rules, and (b) as to service, until the Commission determines under Section 214(a) that the public convenience and necessity will not be adversely affected by withdrawing the service now obtained by WU under the contracts.

22. WU states that AT&T is attempting to apply the interim OCC tariffs without prior FCC review or clearance, although the application of these tariffs would increase WU's facilities charges by approximately 150% above current charges (approximately $35 million per year). In addition, WU avers that AT&T proposes to terminate contracts by which WU leases wideband facilities which are not available under the interim OCC tariffs. It estimates the additional cost of replacing these facilities with individual voice-grade channels offered in the interim OCC tariffs to be approximately $2 million

per year. WU submits that AT&T may not unilaterally apply the interim OCC tariffs to it without first seeking prior FCC review of those tariffs to determine whether they are *prima facie* lawful.

AT&T's Response

23. AT&T briefly responds by stating that the heart of WU's position is its inability to pay the interim OCC tariff rates when Contract Nos. 1 and 2 terminate. AT&T submits that when these contracts terminate, it will have no alternative but to apply the interim OCC tariff rates to the extent that the facilities offered in the OCC tariff are basically no different than facilities now provided under contract. Where there is a gap between the facilities offered via tariffs and via contracts, AT&T states, it has proposed to expand the interim OCC tariffs to include the instant nationwide telegraph grade facilities. As to the facilities presently provided WU, the only change will be in the rates. The application of the interim OCC tariffs to WU requires no further Commission action except with respect to the expanded telegraph grade tariff filing now before it. AT&T argues that the Settlement Agreement in Docket 20099 and related Commission orders provide the basis, and, in fact, require the application of the interim OCC tariffs to WU. To the extent that a few special offerings now available under Contract Nos. 1 and 2 may be offered differently under the interim OCC tariffs, AT&T states it will continue to offer the same facilities to WU as are now offered under the contract agreements.

Discussion

24. The three WU petitions, i.e., for rejection, for suspension and investigation, and for a declaratory ruling raise similar and interrelated questions. Therefore, we will discuss the issues we believe are related to these petitions together.

25. First, we will review the termination of existing Contract Nos. 1 and 2 and the tariff provisions which will replace them. The privately negotiated contracts under which WU leases local distribution facilities have been in existence for many years and as previously stated, the Contract Nos. 1 and 2 which are currently in force became effective in January of 1970 and provide telegraph grade facilities both within and between local telephone exhange areas. These contracts had no fixed expiration date but their provisions allow either party to terminate the agreement after a five year notice period. As indicated, AT&T exercised this contract right by giving WU appropriate notice that these contracts would terminate. Neither party disputes the validity of the contract termination provision or that proper notice of termination was given to WU. Therefore, it is clear that AT&T's exercise of this right was lawful.

Interexchange Rates

26. As we understand the AT&T tariff revisions set forth in Transmittal 13035, they propose an offering of telegraph grade facilities nationwide under the same terms as applicable in its existing Tariff F.C.C. No. 266 (Facilities For Other Common Carriers). Tariff No. 266 applies to the provision of facilities between specified points which are located in different states and applies by cross-reference the rates contained in AT&T's Tariff F.C.C. No. 260 (Rates and Regulations For Private Line Service). More specifically, the rates which will be applicable to the telegraph grade facilities proposed in AT&T's revisions are those currently contained in Section 3.2.1 (Series 1000 channels) of Tariff F.C.C. No. 260.

27. These rates, as contained in Tariff 260, were not negotiated as part of the Docket 20099 proceeding and have been applied to all the OCCs uniformly for interexchange services. Revisions to these tariff rates have always been filed pursuant to Part 61 of the Rules and

have been accompanied by cost support material (pursuant to Section 61.38). In the instant case, AT&T does not propose any increase or change in the existing Series 1000 rates. It seeks merely to apply those rates to the existing interexchange telegraph facilities in place of those currently offered to WU under Contract No. 2.

28. The most recent revisions to Series 1000 rates, filed on January 22, 1976, are currently under investigation in Docket 20736 to which WU is a party. *See* AT&T, 58 FCC 2d 899 (1976). This investigation was instituted to determine the overall lawfulness of the rates and rate structure of AT&T's Series 1000 services and that investigation specifically covers "any cancellations, amendments or reissues" of Series 1000 rates. *Id* at para. 71. Therefore, the tariff revisions here concerning these services are included in that investigation. In addition, should the rates to WU prove to be unlawful, there is an accounting order in force in Docket 20736 which will enable refunds to be made more easily. This accounting order also applies to the interexchange rate AT&T is applying to WU's facilities. Although this investigation has been temporarily suspended pending the receipt of further information from AT&T, *see AT&T*, 67 FCC 2d 1236 (1978), the lawfulness of the rates here at issue will ultimately be determined as part of the investigation. Therefore, the mere cross-referencing of these existing interexchange rates in the instant filing does not raise a requirement for new 61.38 support data or a further Commission investigation of their lawfulness. The current Docket 20736 proceeding is adequate to address the lawfulness of these rates as well as to protect WU's interest.

Local Distribution (Intraexchange) Rates

29. The facilities currently provided to WU under Contract No. 1 will be offered at the interim OCC tariff rates contained in the 19 BOC facilities tariffs listed in

the Appendix.[11] In October 1976, following the Settlement Agreement, these BOC tariffs were revised as a result of the Docket 20452 proceeding, *supra*, to include an offering of telegraph grade circuits to the IPCs operating in the five gateway cities. These are the same state-by-state rates AT&T seeks to apply to the provision of intraexchange telegraph grade facilities nationwide.

30. As noted above, the Commission has already instituted an investigation into the lawfulness of the OCC facility tariff, Docket 21499 *supra*. We will, therefore, consolidate our investigation of these tariff revisions with this on going investigation. All parties are aware that AT&T has indicated that it will not be able to file its cost and other justification for the OCC facility tariffs until December 1, 1978. While we have expressed a preference for an advanced filing of such data, we recognize that the various studies involved are extensive and time consuming. In any event, since we are now so close to the December 1 date for submission of the cost data, there would appear to be little gain in now attempting to further expedite such cost support information.

31. In summary, then, we have determined that AT&T lawfully terminated Contract Nos. 1 and 2 pursuant to their terms. As to the tariffs AT&T would replace these contracts with, we have found that the interexchange rates it would apply are the same as the Tariff No. 260 telegraph grade rates now applicable to all other OCCs and the general public. As to the intraexchange rates, AT&T would apply the interim OCC tariff rates as negotiated in the Docket 20099 Settlement Agreement, to which WU was a party and signator.[12] Both of these

---

[11] These tariffs are cross-referenced in the BOCs Tariff F.C.C. No. 3 (Local Distribution Facilities for Patrons of the OCCs) which offer facilities to the general public at these same rates.

[12] The fact that this Settlement Agreement specifically excluded its applicability to services provided to WU under Contract Nos. 1

rates are currently under investigation, the former in Docket No. 20736 and the latter in Docket No. 21499.

32. Therefore, it appears that AT&T intends to apply the same rates to WU as it does to all other carriers. While those rates are currently being investigated, we believe AT&T had little alternative but to apply them to WU. Otherwise, it would be subject to a charge of unlawful discrimination contrary to Section 202(a) of the Communications Act. We recognize the magnitude of the increase and its impact on WU and WU's customers.[13] Nonetheless, such a result does not, in itself, warrant either the rejection, suspension or an order to AT&T to extend the current contracts.

33. Nor does the lack of Section 61.38 data, for the reasons stated above, warrant such actions. Although WU has also raised (in a not entirely clear manner) some possible ambiguities in AT&T's tariffs, we believe these, if they do indeed exist, are minor in nature and do not in themselves warrant such action. Nonetheless, we do rely on AT&T's commitment to work out any practical problems that do arise. As to WU's Section 214 discontinuance of service argument, we believe it has no merit. AT&T is not discontinuing service, but merely transferring from provision under contract to provision by tariff. If service to WU is subsequently reduced, impaired or discontinued, we assure WU that appropriate action will be taken.

34. The standard for rejection is that a tariff filing is clearly unlawful on its face. *Municipal Light Board* v.

---

and 2, is no excuse for AT&T to charge different rates for the lease of facilities which appear to be identical to some of the facilities leased by the IRC with the gateway cities.

[13] See our Memorandum Opinion and Order, considered simultaneously herewith, addressing the new higher WU charges to its customers. FCC 78-692, adopted September 27, 1978.

F.P.C. 450 F.*2d* 1341, 1346 (1971); *cert. denied* 405 U.S. 989 (1972). We cannot find that AT&T's tariff filings here must fall under that test. Accordingly, WU's petition to reject will be denied. Concerning its petition to suspend and investigate, as noted above, we will investigate these charges, as appropriate, in connection with the two ongoing proceedings.[14] However, we do not believe suspension is warranted. If we did suspend, there would be no applicable rates in any of the AT&T or BOC tariffs for these services upon expiration of the contracts. Moreover, under the circumstances we find no justification here to summarily order AT&T to continue providing service to WU at the contract rates. In fact, to do so would promote disparate and discriminatory treatment between and among the OCCs. Accordingly, we will deny WU's requests for suspension and for extension of these contracts.[15]

---

[14] Because it appears WU may be the principal, if not the only, user of extended telegraph grade facilities we do not believe it necessary to implement a separate accounting order in these proceedings. If refunds are required AT&T should have no difficulty isolating charges to WU.

[15] Although the above discussion addresses these tariff revisions with respect to WU's telegraph grade facilities, we recognize that there are voice-grade channels leased by WU under Contract Nos. 1 and 2 which are used in the provision of telegraph grade services. We believe the application of the existing interim OCC rates to the voice-grade facilities leased by WU is appropriate and consistent with our policy that AT&T charge the same rates to all other carriers. Since the interim OCC tariffs already include an offering of voice-grade facilities, it appears that no revisions to these tariffs were required to apply those rates to WU. Moreover, as stated above, the Docket 21499 proceeding currently concerns all the facilities offered under the interim OCC tariff rates except the instant telegraph grade facilities. Therefore, the lawfulness of these voice-grade rates are to be investigated in that proceeding, and no further action is required here to initiate such an investigation. Moreover, we do not believe it necessary to discuss WU's

35. Having resolved these primary issues, we will now turn to the ancillary pleadings, i.e. WU's petition for oral argument and its applications for review of the Bureau grants of special permission to AT&T.

Motion to Present Oral Argument

36. In support of its motion, WU suggests oral argument is fully warranted here because of the complexity of the issues and the time available for consideration of its extensive filings. It also states that if allowed to become effective, the Bell filings will have a substantial adverse impact on a competitive telecommunications industry. WU then summarizes the various filings it has made against the AT&T and BOC tariff revisions, suggesting that oral argument will accord an opportunity for the Commission to give a more detailed consideration of the "difficult and important questions" it has presented in these pleadings.

37. Without unnecessary elaboration, we are persuaded that both AT&T's and WU's written presentations have more than adequately presented their positions relative to these tariff revisions. In addition, WU's Motion is void of any substantial support for its extraordinary request, except to suggest that this AT&T tariff action will have disruptive effects upon it and the communications industry. While, as indicated above, we can appreciate WU's concern over these substantially higher rates, that in itself does not warrant oral argument at this stage of a tariff proceeding. Moreover, considering the timing of the October 1 effective date of these tariffs revisions, we must necessarily be prepared to act by that date. Accordingly, we do not believe that oral argument would

---

allegations as to the lawfulness of these rates since we have already initiated that investigation. WU, as a party to that proceeding, will have ample opportunity to present its arguments therein.

be appropriate at this stage of the proceeding. As noted above, WU will have ample opportunity in the course of the hearings to test the lawfulness of AT&T's tariff filings.

WU's Applications for Review

38. WU has filed Applications for Review of the grants of Special Permission Nos. 9026, 9027, 9059 which were made pursuant to delegated authority by the Chief, Common Carrier Bureau on June 9, 1978 and July 28, 1978.

39. These special permissions, as mentioned earlier, waived certain requirements of Part 61 of the Rules (specifically, Sections 61.38 and 61.74)[16] and enabled AT&T and the BCCs to file tariff revisions providing for an offering of telegraph grade facilities and special routing facilities. Essentially, WU avers that the waivers of Section 61.38 does not allow for Commission review of these tariff revisions which impose an estimated $37 million in annual rate increases to it. Therefore, it suggests, the Bureau acted improperly in granting this waiver and the grants must be considered unlawful. Except for charges of *ex parte* violations discussed in para. 41, WU makes no additional arguments in these pleadings that have not been made by it in other pleadings as noted above.

40. The procedures involved in the application and grant of special permission requests under Part 61 of the Rules,[17] do not prejudice the rights of any interested

---

[16] Section 61.38 requires that any tariff filing or tariff change be accompanied by economic data and information to support the changed or new matter, including an up-to-date cost of service study and projection of costs, and estimate of the effects of the changed or new tariff upon the carrier's traffic and revenues. Section 61.74 prohibits, with limited exceptions, the cross-referencing to other documents in a tariff filing.

[17] Specifically Sections 61.151-61.153, 47 C.F.R. §§ 61.151-61.153.

person to voice opposition to a tariff filing made pursuant to such a grant. Any party who believes it has been adversely affected by such Bureau action has ample opportunity under our Rules to oppose the tariff filing itself. While we recognize the lack of Section 61.38 data may make the filing more difficult to analyze, we have reviewed the need for such data, as discussed above, and have concluded that under the circumstances of this case that it should not be required. Should the anticipated filing of AT&T's fully justified permanent OCC tariffs provide a basis for further review of these interim rates, we will take appropriate action at that time. Therefore, we conclude that the Bureau's grant of these special permissions was appropriate.[18]

41. In addition to its other arguments, WU suggests that the Bureau Staff acted in an *ex parte* manner in dealing with AT&T during the period immediately preceding these grants of special permission. WU supports its contentions by stating that neither AT&T nor the Bureau staff notified it that the special permission requests were pending and in addition, WU was not invited to attend the one or more private meetings held between AT&T and the staff to discuss the applications. The Bureau's action is the product of a one-sided presentation by AT&T that WU had no opportunity to contest or challenge, WU states, and as a result it has filed a Freedom of Information Act request to elicit whatever records

---

[18] Since 1975, AT&T states, and our records confirm, that waivers of Part 61 of the Rules and specifically Section 61.38, as appropriate, have been granted for revisions to the interim OCC tariff. Each such grant has also contained the following condition:

> The granting of this request is not to be construed as approval by the Commission's of the proposed filing and is made without prejudice to any action which the Commission may take with respect thereto.

exist of these meetings.[19] WU concludes that the Bureau transformed the agency review process of these tariff amendments into a secret *ex parte* proceeding in which only AT&T's views were heard, thereby effectively deciding the ultimate issue of whether the tariffs in question were just and reasonable and otherwise lawful.

42. First, we should state that the procedure involved in the processing of applications for special permission is not one of competing claims for a valuable privilege which WU infers is the case here.[20] Nor is a carrier action in merely making a tariff filing in itself a rule-making to which our *ex parte* rules have been held to apply. *See Home Box Office* v. *F.C.C.* 567 F.2d 9 (D.C. Cir. 1977). The end result of the special permission process is analogous to any interlocutory action taken by the Commission and in no way reflects upon or predetermines the Commission's final decision as to the merits of a tariff filing. Secondly, at the time these staff-AT&T meetings took place there were no tariff revisions on file. Therefore, there could be no *ex parte* contacts under the rules.[21] Moreover, we are informed by the staff that these discussions were brief and involved only procedural requirements for the filing of the special permission applications. *See WUI* v. *FCC*, 568 F. 2d at *1019*. Therefore, we conclude that WU's position was not prejudiced by these meetings, nor were our *ex parte* rules violated. Moreover, it is obvious from the amount of pleadings and arguments made in this proceeding that WU has had every opportunity to present fully its arguments and to counter those made by AT&T.

---

[19] The Bureau has already responded to WU's FOI request by letter dated July 14, 1978. We are informed that there are no additional records, other than those WU already has, of these meetings.

[20] *P.U.C. of California* v. F1 FCC, 356 F. 2d 236 (1966); *Sangamon Valley TV Corp.* v. *U.S.* 269 F. 2d 221 (D.C. Cir. 1959).

[21] See Rule Sections 1.1201 — 1.1252, 47 C.F.R. §§ 1.1201 — 1.1252.

Conclusion

43. In light of our preceding determination that the Bureau's grants of Special Permission and waiver of certain Sections of Part 61 of the Rules were in keeping with our past policies toward revisions to the interim OCC tariffs, we will affirm those grants. We also believe that the application of these interim OCC tariffs to WU is in keeping with our policy of requiring AT&T to provide facilities and services to all other carriers on a reasonably consistent and non-discriminatory basis. This is, of course, not to say that we have addressed the lawfulness of the OCC tariffs or the Series 1000 rates currently in effect or the OCC tariffs that will be filed on December 1, 1978. Such determination will be made in context with the ongoing investigations. Finally, we have found no valid basis for either the rejection or suspension of AT&T's and the BOCs' revisions to the interim OCC tariffs. We will however, specifically incorporate the AT&T and BOC revisions to these tariffs in the Docket 21499 investigation. The investigation in Docket 20736 includes the revisions which AT&T is applying to WU's interexchange service and requires no further action here.

Accordingly, IT IS ORDERED, That the Application For Review of the Chief, Common Carrier Bureau's grants of Special Permission Nos. 9026, 9027 and 9059 IS DENIED.

IT IS FURTHER ORDERED, That the Motion to Present Oral Argument IS DENIED.

IT IS FURTHER ORDERED, That the Petition for Declaratory Order and the requests for Commission action pursuant thereto, IS DENIED consistent with the foregoing.

IT IS FURTHER ORDERED, That the Petitions for Rejection of the revisions to the interim OCC tariff IS HEREBY DENIED.

IT IS FURTHER ORDERED, That the Petitions for Suspension and Investigation of the revisions to the interim OCC tariffs ARE GRANTED, to the extent that the revisions to AT&T's and the 19 Bell System Operating Company's Tariffs ARE HEREBY INCORPORATED in the Docket 21499 investigation and ARE OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX

	OCC Tariff No.	Trans. No.
Interexchange Facilities		
American Telephone & Telegraph Co.	266	13035
Local Distribution Facilities		
Bell System Operating Cos.	3	15
Bell Telephone Co. of Pennsylvania	38	614
C&P Telephone Co.	2	23
Cincinnati Bell Inc.	34	265
Illinois Bell Telephone Co.	38	609
Michigan Bell Telephone Co.	37	394
Mountain States Telephone & Telegraph Co.	59	564
New England Telephone & Telegraph Co.	39	608
New Jersey Bell Telephone Co.	33	322
New York Telephone Co.	39	532
Northwestern Bell Telephone Co.	45	841
Ohio Bell Telephone Co.	37	558
Pacific Northwest Bell Tel. Co.	4	18
Pacific Telephone & Telegraph Co.	126	879
South Central Bell Telephone Co.	3	22
Southern Bell Telephone & Telegraph Co.	55	1176
Southern New England Telephone Co.	33	220
Southwestern Bell Telephone Co.	65	1122
Wisconsin Telephone Co.	35	438

APPENDIX D

FCC 78-746

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Transmittal No. 13035, *et al.*

IN THE MATTER OF

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and BELL SYSTEM OPERATING COMPANIES

Docket No. 20736

REVISIONS TO THE AT&T LONG LINES DEPARTMENT
and BELL SYSTEM OPERATING COMPANIES

Docket No. 21499

INTERIM OCC TARIFFS TO REFLECT A NEW EXPANDED
OFFERING OF TELEGRAPH GRADE FACILITIES

ORDER

(Adopted: October 19, 1978; Released: October 27, 1978)

BY THE COMMISSION:

1. In our Memorandum Opinion and Order in this proceeding (FCC 76-691, released October 12, 1978 (October 12 Order)), we treated fully the various opposition pleadings filed by The Western Union Telegraph Company (WU) to the above-captioned tariff revisions. These revisions, filed by AT&T Long Lines (AT&T) and the Bell System Operating Companies (BOCs), essentially involved the expiration of the Western Union-AT&T exchange of facilities contracts (Contract Nos. 1 and 2) and the coincident replacement of those contract offerings with certain interim Other Common Carrier (OCC) facilities tariff offerings. In our discussion of the telegraph-grade facilities offerings proposed by AT&T and the BOCs in their tariff revisions, we noted that the interexchange and intraexchange tariff rates AT&T and the

BOCs were applying to WU for such facilities were already subject to investigation in two separate proceedings previously designated by the Commission as Docket 20736 [1] and Docket 21499.[2] *See* FCC 78-691 at para. 31. WU appears to be uncertain as to the scope of these investigations in relation to the telegraph grade facility rates it is now being charged under the interim OCC tariffs.[3]

2. Initially, we restate our intention, first stated in the October 12 Order, to include all rates and charges involved in these tariff revisions in an ongoing investigation. However, we recognize that our discussion may have oversimplified a complex situation in referring broadly to the interexchange telegraph grade service as being investigated in Docket No. 20736 and intraexchange telegraph grade services in Docket No. 21499.[4] Docket No. 20736 does cover AT&T's F.C.C. Tariff No. 260, Series 1000, which offers interexchange telegraph grade service. But the Bell tariff revisions in question also offer some interexchange facilities—namely, those offered by the BOCs that lie wholly within a single state—which are not subject to the investigation in Docket 20736.[5] However, Docket No. 21499, which is an investigation of

---

[1] AT&T, 58 F.C.C. 2d 899 (1976).

[2] AT&T, 66 F.C.C. 2d 1018 (1977).

[3] Western Union expressed its uncertainty in a letter dated October 3, 1978 to the Commission's litigation counsel. A copy of the letter was served on AT&T.

[4] The terms "interexchange" and "intraexchange" can be ambiguous depending on the definition of the exchange. As used here, and in our October 12 Order, we use the terms to mean intercity and intracity, respectively.

[5] All service discussed is interstate by reason of interconnection and is therefore subject to our jurisdiction. However, because the 266 Tariff and the 19 BOC tariffs resulted from a settlement agreement in Docket 20099, *AT&T*, 47 F.C.C. 2d 660 (1974), different rates apply to lines physically within each state as contrasted to lines which actually cross state boundaries.

AT&T's F.C.C. Tariff No. 266 and 19 BOC tariffs offering services and facilities to other common carriers (OCCs), includes these BOC interexchange facilities as well as intraexchange facilities.[6]

3. We again wish to assure WU and all other parties that all of the rates and charges now applicable to WU (in lieu of those previously provided under Contracts Nos. 1 and 2) will be fully investigated. Docket No. 20736 has an accounting order outstanding under which refunds could be ordered if the rates are found to be unlawfully high. WU or any other party can obtain similar relief, as appropriate, following the decision in Docket No. 21499, or any other proceeding involving the OCC rates, by filing a complaint under Section 208 of the Communications Act. 47 U.S.C. § 208. In any event, we should note that we will more precisely define the scope of both of these proceedings prior to the actual start of the hearings in order to eliminate any overlap or duplication of effort.[7]

4. Accordingly, IT IS HEREBY ORDERED that our Memorandum Opinion and Order released October 12, 1978 in these proceedings, IS CLARIFIED as indicated above.

FEDERAL COMMUNICATIONS
COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

---

[6] More precisely, Tariff 266 offers services that are physically interstate. This tariff, however, cross-references the rates in the Tariff 260. On the other hand, the 19 BOC tariffs apply both to intraexchange and interexchange services that are physically within a state.

[7] In December 1978, AT&T is required to file cost justified rates for all the OCC interim tariffs. We understand that it intends to file two new tariffs to replace the current 20. After receipt and review of such new filings, we intend to review the scope of both of these current proceedings and adjust them, as appropriate, to accommodate the December 1978 filings.

APPENDIX E

Statutes and Regulations Involved

Communications Act of 1934

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall

prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

* * * *

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

* * * *

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special cir-

cumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices, affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

* * * *

§ 204 Hearings on new charges; suspension pending hearing; refunds

(a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reasons of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the

hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

* * * *

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier, or carriers, is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect

any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

* * * *

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

* * * *

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such

person shall not have the right to pursue both such remedies.

* * * *

§ 208. Complaints to Commission; investigations

Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complaint.

* * * *

§ 209. Orders for payment of money

If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

* * * *

§ 402 Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

* * * *

28 U.S.C. § 2342

Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47.

* * * *

Rules and Regulations of the Federal Communications Commission

§ 61.38 Material to be submitted with letters of transmittal by filing carriers.

(a) *Explanation and data supporting changes and/or new tariff offering.* The material to be submitted for a tariff change or for a tariff filing which is for a service not previously offered, shall include: (1) An explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed; and (2) economic data and information to support the changed or new matter including:

(i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period: and for changed and new matter a study containing a projection of costs for a 3-year period beginning at the date of the filing of the tariff matter; and

(ii) Estimates of the effects of the changed or new matter upon the carrier's traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from the other service classifications of the carrier; and upon the overall traffic and revenues of the carrier. Estimates should include the estimated effects on the traffic and revenue data for the most recent 12-month period and projections for a 3-year period beginning at the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates should be provided.

(b) *Working papers and statistical data.* (1) There is to be furnished to the Chief, Common Carrier Bureau, upon filing of any tariff change or tariff filing which is for a service not previously offered, two sets of working papers for use by the staff and two sets of working papers which shall be available for use by the public at the Commission's offices. These working papers shall contain the information underlying the data supplied in response to paragraph (a) of this section. A clear indication shall be made as to how the working papers relate to information supplied in response to paragraph (a) of this section.

(2) All statistical studies will be submitted and supported in the form prescribed in § 1.363 of this chapter.

(c) *Submission of explanation and data by connecting carriers.* If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, it will be the duty of the connecting carrier to provide the data and information in paragraphs (a) and (b) of this section on the date the tariff matter is filed with the Commission by the issuing carrier.

(d) *Form and content of material submitted with certain rate increases.* (1) For each rate increase in any service or tariffed item resulting in (i) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (ii) at least $100,000 in additional

annual revenues, both calculated on the basis of existing quantities of service; or for two or more rate increases applying to the same service or tariffed item during any 12-consecutive-month period resulting in (*a*) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (*b*) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities of service, the filing carrier shall submit all cost, marketing and other data on which it relies in justification of the rate increase and in an appropriate form to serve as the carrier's direct case in the event the rate increase is set for hearing initially scheduled to commence on a date within 6 months from the date of filing. If the rate increase is designated for hearing the carrier shall submit any additional information on which it relies in documentary form, within 45 days from the date of designation.

(2) The information and data requirement of paragraph (d) (1) of this section shall be submitted for a rate increase in any service or tariffed item resulting in more than $1 million in additional annual revenues, as calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues.

(3) The requirement imposed here is in addition to any requirement imposed by the other provisions of this section.

(e) *Copies of explanation and data to customer.* Concurrently with the filing of any rate for special construction or special assembly equipment and arrangements which was developed on the basis of estimated cost, the filing carrier shall transmit to the customer a copy of the explanation and data required by paragraphs (a) and (b) of this section.

(f) *Exception.* The requirements of this section shall not apply to any carrier with the annual gross revenues of less than $100,000.

FILED
MAY 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

BURTON K. KATKIN
American Telephone and
Telegraph Company
195 Broadway
New York, New York 10007
(212) 393-5380
Counsel of Record

RAYMOND BRENNER
ELEANOR RICHTER OLARSCH
Attorneys for American Telephone and Telegraph Company

Of Counsel:
HOWARD J. TRIENENS

May 1981

QUESTION PRESENTED

The question raised by the Petition of The Western Union Telegraph Company is whether an order of the Federal Communications Commission denying petitions to reject tariff filings is subject to judicial review when statutory complaint procedures are available and indeed are being pursued to assure the justness and reasonableness of the rates applicable upon the effectiveness of the tariff.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	7
APPENDICES	
APPENDIX A —Complaint of *Western Union Telegraph Co. v. AT&T,* FCC File No. E-80-34, Sept. 30, 1980 .	A-1
APPENDIX B —Erratum Notice, *Western Union Telegraph Co. v. AT&T,* filed Oct. 7, 1980	B-1

TABLE OF AUTHORITIES

	Page
Judicial Decisions:	
Aeronautical Radio Inc. v. FCC, No. 77-1333 (D.C. Cir. Nov. 5, 1980), *cert. denied*, 49 U.S.L.W. 3780 (U.S. April 20, 1981) (Nos. 80-1343, 80-1408)	*passim*
American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970)	5
American Telephone & Telegraph Co. v. FCC, 487 F.2d 865 (2d Cir. 1973)	6
Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963)	*passim*
Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800 (1973)	4
Papago Tribal Utility Authority v. FERC, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S.—, 101 S. Ct. 784 (1980)	*passim*
Southern Railway Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979)	*passim*
United States v. SCRAP, 412 U.S. 669 (1973)	4
Western Union Telegraph Co. v. FCC, No. 78-1955 (D.C. Cir. Jan. 13, 1981)	3, 4, 6
Administrative Decisions:	
AT&T (Docket No. 20099), 52 F.C.C.2d 727 (1975)	3
AT&T, Transmittal No. 13035 (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978)	2, 3
AT&T, Transmittal No. 13035 (Docket Nos. 20736, 21499), 70 F.C.C.2d 1294 (1978)	3, 6
In the *Matter of Western Union Telegraph Co. v. AT&T and the Bell System Operating Companies*, FCC File No. E-80-34, Sept. 30, 1980	2, 6
Statutes and Regulations:	
Communications Act of 1934, 47 U.S.C. § 151 *et seq.*	
Section 208, 47 U.S.C. § 208	6
47 C.F.R. § 61.38	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1687

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN TELEPHONE AND TELEGRAPH COMPANY IN OPPOSITION

Respondent, American Telephone and Telegraph Company ("AT&T"),[1] respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

[1] AT&T has no parent company. In addition to its wholly-owned subsidiaries, AT&T has ownership interests in: The Pacific Telephone and Telegraph Company; The Southern New England Telephone Company; Cincinnati Bell Incorporated; and Cuban American Telephone and Telegraph Company.

STATEMENT OF THE CASE

In general, the petitioner's statement of the case sets forth adequately the facts required by this Court to rule on the instant Petition, and AT&T, for the purposes of this Opposition, accepts the petitioner's statement as written with three significant additions.[2]

First, omitted from the Petition is any reference to the procedural history subsequent to the FCC's denial of petitions to reject the tariffs which are at the heart of this action. On September 30, 1980, Western Union, at the very time that it was challenging before the Court of Appeals the FCC's refusal to reject the tariffs, commenced a formal complaint proceeding before the FCC challenging the validity of the same tariffs which were the subject of its appeal.[3] The propriety of such a complaint proceeding was specifically recognized by the FCC in its Order denying petitions to reject the challenged tariff.[4]

Second, omitted from petitioner's statement is the fact that the provisions of Western Union Contract Nos. 1 and 2 allowed either party to terminate the contract after a five-year notice period and that in 1973, the Bell System Companies lawfully exercised this contract right by giving Western Union appropriate notice that these contracts would terminate. Neither party now disputes the validity of the contract termination provision or that proper notice of termination was given to Western Union.[5]

---

[2] References to appendices to Western Union's petition are cited herein as "P.A."

[3] *In the Matter of Western Union Telegraph Co. v. AT&T and the Bell System Operating Companies,* FCC File No. E-80-34. The complaint was filed on September 30, 1980, and is appended herein, as Appendix A. Exhibits to the complaint have been deleted. An "Erratum Notice" filed by Western Union on October 7, 1980 is Appendix B.

[4] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978), see P.A. ¶ 3 at 32a.

[5] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978), see P.A. ¶ 25 at 19a; see also complaint of Western Union, Appendix ¶ 6 at A-2.

Third, while Western Union claims that the tariffs replacing the Contracts would increase Western Union's rates by 150%, it fails to acknowledge that: (a) all Other Common Carriers ("OCCs") were paying rates substantially in excess of the Western Union Contract rates by virtue of the Settlement Agreement in Docket No. 20099,[6] to which Western Union was a party; and (b) the OCC rates, filed in accordance with the Docket No. 20099 Settlement Agreement, themselves reflect a significant discount from the rates paid by Bell customers for comparable private line services.

REASONS FOR DENYING THE WRIT

This Court recently decided the precise issues of reviewability raised in the instant petition in *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). And this Court has recently denied review of two Court of Appeals decisions applying the law as set forth in that case: *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S.—, 101 S. Ct. 784 (1980); and *Aeronautical Radio Inc. v. FCC*, No. 77-1333 (D.C. Cir. Nov. 5, 1980), *cert. denied*, 49 U.S.L.W. 3780 (U.S. April 20, 1981) (Nos. 80-1343, 80-1408).

The Court of Appeals, in declining to review, as non-final,[7] the FCC's denial of Western Union's peititions for rejection or suspension,[8] applied well established legal principles consistent with the decisions of this Court. Furthermore, the Court of Appeals did not even find the issues in this case sufficiently

---

[6] *AT&T (Docket No. 20099)*, 52 F.C.C.2d 727 (1975). For the purposes of Docket 20099, the following are generally understood to be OCCs: specialized common carriers; domestic satellite carriers; domestic record carriers; and international record carriers.

[7] *Western Union Telegraph Co. v. FCC*, No. 78-1955, (D.C. Cir. Jan. 13, 1981), see P.A. at 1a.

[8] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 69 F.C.C.2d 724 (1978), see P.A. at 4a; *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 70 F.C.C.2d 1294 (1978), see P.A. at 30a.

unique to warrant an opinion, summarily dismissing petitioner's appeal in light of its decision in *Aeronautical Radio Inc. v. FCC ("ARINC"), supra.*[9] The question presented in the Petition is neither of national importance nor does it raise issues of substantial importance to anyone other than the parties. Nor does petitioner assert the existence of any conflict among the courts of appeals or with any applicable decision of this Court. Therefore, the Petition fails to present an appropriate question for this Court's consideration.

The decision below was required by the line of decisions establishing that reviewing courts lack authority to interfere with agency decisions concerning the effectiveness of tariff filings.[10] This Court, in *Southern Railway, supra,* held unreviewable the Interstate Commerce Commission's decision not to investigate a tariff revision. It thus allowed the tariff to become effective, even in the face of assertions that the rates in the tariff were patently illegal, reasoning that such a decision was committed to the discretion of the agency and that statutory complaint procedures remained available to allegedly aggrieved ratepayers. *See also Arrow Transportation Co. v. Southern Railway Co.,* 372 U.S. 658 (1968). The Court of Appeals in *Papago Tribal Utility Authority, supra,* following the reasoning of *Southern Railway,* found generally unreviewable an agency decision to accept a carrier-initiated tariff, stating that the decision whether to "accept a rate filing is based on precisely the same information, and primarily the same considerations, that govern decisions to suspend or not to suspend, to investigate or not to investigate." 628 F.2d at 243. The Court of Appeals stressed that it was loath to "intervene in the midst of agency proceedings" as to do so would be "to disrupt the administrative process." *Id.* at 238.

Western Union here asks this Court to reverse itself but fails to raise significant issues which permit departure from

---

[9] See *supra,* n. 7.

[10] *E.g., Arrow Transportation Co. v. Southern Railway,* 372 U.S. 658 (1963); *United States v. SCRAP,* 412 U.S. 669 (1973); *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade,* 412 U.S. 800 (1973).

prior controlling decisions. First, petitioner raises the question of compliance with important "threshold requirements" established by the Commission (Petition, pp. (i), 9), in particular, the FCC's cost support filing requirements, Section 61.38 (47 C.F.R. § 61.38), asserting that non-compliance with this FCC rule provides a sufficient basis for distinguishing the instant case. This very issue was present in *Papago, supra,* where the court, quoting *American Farm Lines v. Black Ball Freight Service,* 397 U.S. 532, 536-39 (1970), held that such filing requirements are "merely aids to the exercise of the agency's independent discretion, . . . giving rise to no duty in the agency and no power of review in the courts." *Id.* at 247. The court below thus followed its own precedent that, in turn, rested on rules of unreviewability established by this Court in *American Farm Lines, supra,* and consistently followed thereafter. *See also Southern Railway, supra.*

Second, the Petition raises the argument that the availability of "the statutory complaint remedy is patently inadequate to redress the [competitive] injury" Western Union claims it would suffer from increased rates in the subject tariffs (Petition, p. 11). But, neither *Southern Railway, supra,* nor *Arrow, supra,* depended upon the availability of alternative forms of relief such as complaint procedures. While in *Southern Railway* this Court acknowledged that the availability of complaint procedures is a factor strongly weighing against reviewability, 444 U.S. at 463, the Court did not rest its decision on that basis alone. Rather, *Southern Railway,* established that non-reviewability of agency determinations to accept, or to refuse to reject, investigate or suspend tariffs, is independent of the availability of a complaint procedure. *Id.* at 459 n.12, 463-464. In any event, *Southern Railway, Papago, supra,* and *ARINC, supra,* make it clear that the availability of a complaint procedure alone suffices to render the agency tariff decision unreviewable.[11] The Communications Act provides such a

[11] The Court of Appeals in ARINC stated: "The *Papago* and *Southern Railway* cases require us to hold that the availability of a complaint procedure renders the FCC's [tariff] acceptance decision in this case non-final." Slip Op. at 27-28.

complaint procedure, 47 U.S.C. §208,[12] and, indeed, petitioner has availed itself of that remedy.[13] Further, as for petitioner's competitive injury claim, this court, in *Arrow, supra,* despite the petitioners' claim there that allowing tariff rates to become effective would "inevitably and immediately" drive them out of business, held suspension decisions to be non-reviewable. 372 U.S. at 672-73; *see also Southern Railway,* 442 U.S. at 459 n.12. Hence petitioner's second argument also fails to present a question warranting review.

On April 20, 1981, this Court denied petitions for certiorari in *ARINC, supra.* The Court of Appeals in the decision below, summarily dismissed this petitioner's appeal in light of its decision in *ARINC,* which held that an agency decision allowing a tariff revision to become effective is unreviewable because it does not finally determine the lawfulness of the revised tariff.[14] Moreover, in the instant case there are additional reasons for the Court to deny the Petition and to permit the administrative process to proceed to conclusion. First, here, the Commission has assured Western Union that there are two ongoing proceedings in which "all of the rates and charges now applicable to WU [Western Union] ... will be fully investigated";[15] these proceedings provide relief in addition to the remedy available to Western Union under the complaint procedures of the Communications Act, 47 U.S.C. §208, *supra.* Second, here, Western Union has already invoked the FCC's complaint process[16] providing all the more reason to adhere to traditional principles of finality and permit ongoing administrative proceedings to progress to conclusion under the statutory ratemaking scheme of the Communications Act.[17]

---

[12] For the text of 47 U.S.C. § 208, see P.A. at 40a.

[13] See *supra,* n. 3.

[14] See *supra,* n. 7.

[15] *AT&T, Transmittal No. 13035* (Docket Nos. 20736, 21499), 70 F.C.C.2d 1294 (1978), see P.A. ¶ 3 at 32a.

[16] See *supra,* n. 3.

[17] See *e.g., Papago, supra,* 628 F.2d at 238; *Arrow, supra,* 372 U.S. at 669-672; *American Telephone and Telegraph Co. v. FCC,* 487 F.2d 865, 872 (2d Cir. 1973).

CONCLUSION

The Court of Appeals correctly applied the principles established by this Court. The interlocutory character of the Commission's tariff rejection denials stands as ample reason to deny the Petition. Moreover, the decision below neither conflicts with the decision of any other court of appeals nor presents a question of national importance. The Petition has failed to show any reason why this Court should review any aspect of the decision. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

BURTON K. KATKIN
American Telephone and
Telegraph Company
195 Broadway
New York, New York 10007
(212) 393-5380
Counsel of Record

RAYMOND BRENNER
ELEANOR RICHTER OLARSCH
Attorneys for American Telephone and Telegraph Company

Of Counsel:
HOWARD J. TRIENENS

May 1981

APPENDICES

APPENDIX A

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY, *Complainant,* v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM OPERATING COMPANIES.	**File No. E-80-34** **Docket No.**

To: The Commission

COMPLAINT

Pursuant to Sections 201, 202, 204, 206, 207, 208 and 209 of the Communications Act, as amended, and Section 1.721, *et seq.* of the Commission's Rules and Regulations, The Western Union Telegraph Company ("Western Union") hereby files this Complaint against the American Telephone and Telegraph Company and its affiliated Bell System Operating Companies (collectively, the "Bell System"). In support thereof, Western Union respectfully shows as follows:

1. Complainant Western Union is a communications common carrier subject to the Commission's jurisdiction under Title II of the Communications Act. Its address is One Lake Street, Upper Saddle River, New Jersey.

2. Defendant American Telephone and Telegraph Company ("AT&T") is a communications common carrier subject to the Commission's jurisdiction under Title II of the Communications Act. Its address is 195 Broadway, New York, New York.

3. Defendants the Bell System Operating Companies ("BSOCs") are communications common carriers subject to the Commission's jurisdiction under Title II of the Communications Act. A list of the companies and their addresses is attached hereto and incorporated herein as Exhibit A.

4. Commencing on October 1, 1978, and continuing to the present, Western Union has leased from the Bell System, pursuant to tariff, facilities for use in providing interstate common carrier services to the public within the continental United States. Facilities that commence within one state and terminate in another state are leased by Western Union from the AT&T Long Lines Division, under the rates and charges set forth in FCC Tariff No. 266, Facilities for Other Common Carriers. Facilities that commence and terminate within the same state are leased by Western Union from the individual BSOCs, under the rates and charges set forth in each company's Facilities for Other Common Carriers tariff. A list of all tariffs under which Western Union has leased or continues to lease the subject facilities (the "Bell tariffs") is attached hereto and incorporated herein as Exhibit B.

5. Prior to October 1, 1978, Western Union leased facilities for use in providing common carrier services to the public pursuant to contractual arrangements between Western Union and the Bell System (the "Bell-Western Union contracts"). Certain other facilities, including foreign exchange, common control switching arrangements and domestic satellite service were leased prior to October 1, 1978, and continue to be leased, under the terms of the applicable Facilities of Other Common Carriers tariffs.

6. The Bell-Western Union contracts were negotiated at arms-length between the parties. They became effective in January 1970, and were filed with the Commission pursuant to Section 211(a) of the Communications Act, 47 U.S.C. § 211(a). Following duly filed notice by the Bell System, the contracts expired on September 30, 1980.

7. In place of the facilities offerings under the expired Bell-Western Union contracts, the Bell System unlawfully has

applied to Western Union facilities offerings contained in the Bell tariffs, as listed on Exhibit B. Prior to expiration of the Bell-Western Union contracts, Western Union duly protested to the Commission application of the Bell tariffs to Western Union. Western Union's claims for declaratory and other relief were denied by the Commission in a Memorandum Opinion and Order released on October 12, 1978 (FCC 78-691). On October 19, 1978, the Commission adopted a second Order clarifying the previous Order (FCC 78-746). The lawfulness of the Commission's Orders is now the subject of a pending petition for review in the United States Court of Appeals for the District of Columbia Circuit, *Western Union Telegraph Co. v. FCC*, No. 78-1955. Subsequently, on June 5, 1980, AT&T and the Bell System were permitted by the Commission to revise those tariffs by increasing the rates contained therein. *See* Mimeo No. 32427, adopted by Chief, Common Carrier Bureau, June 4, 1980. The lawfulness of that increase is also pending before the United States Court of Appeals for the District of Columbia Circuit. *MCI Telecommunications Corp. v. FCC*, No. 80-1624.

8. The charges set forth in the Bell tariffs are substantially in excess of those set by the Bell-Western Union contracts, despite a long-term trend downward in the costs of providing long-distance circuitry, which comprises the bulk of the facilities leased by Western Union under the Bell tariffs. Upon information and belief, the rates and charges contained in the Bell tariffs, both before and after they were revised upward on June 5, 1980, are substantially in excess of the costs of providing the subject facilities to Western Union, and are therefore unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).

9. Application of the Bell tariffs to Western Union has resulted in unreasonable discrimination against Western Union in violation of Section 202(a) of the Communication Act, 47 U.S.C. § 202(a), as follows:

a. In certain markets the rates and charges applicable to Western Union under the Bell tariffs are unreasonably

and unjustly discriminatory in that Western Union is required to pay more for facilities leased from the Bell System for use in providing in retail service (rendered via Western Union's own network as well as the Bell supplementary facilities) than the Bell System charges for the identical retail service (provided solely via its own facilities). Thus, Western Union is being charged more for a portion of a service than retail customers are charged for the entire service. The nature of the resulting unreasonable discrimination against Western Union is set forth more fully, with examples of the operation and effect of such discrimination, in the affidavits of Frank M. McGarry and James F. Toner, submitted in support of Western Union's Petition for a Declaratory Order (filed July 27, 1978). Those affidavits are attached hereto as Exhibits C and D and incorporated herein.

b. The OCC tariffs filed by the BSOCs are unreasonably and unjustly discriminatory on their face, in that the rates charged for facilities under the BSOC tariffs vary greatly from state to state and from one Bell company to another; the rates charged for such facilities are in many instances higher than the intrastate private line rates charged by the BSOCs; and the rates applicable to Western Union are in many cases higher than the rates AT&T charges its own retail customers for such channels, especially for distances of 200 miles and up. The nature of the resulting unreasonable discrimination against Western Union is set forth more fully, with examples of the operation and effect of such discrimination, in Western Union's July 27, 1978, Petition for a Declaratory Order, at 32-40, and Petition to Suspend and Investigate the BSOCs' revised telegraph grade offerings, at 8-11. The excerpts from these petitions are attached hereto as Exhibits E and F and incorporated herein.

10. Under the Bell tariffs, the Bell System has refused, in contravention of Sections 201 and 214 of the Communications Act, 47 U.S.C. §§ 201, 214, to continue to lease to Western Union certain base group and supergroup channels previously

leased to Western Union under the Bell-Western Union contracts. In addition to protesting this refusal in connection with its protests of the October 1, 1978 tariff revisions, Western Union has petitioned the Commission to hold that the withdrawal of base group and supergroup channels in the absence of Commission certification under Section 214 of the Communications Act is unlawful and to require the Bell System to continue to provide such facilities. The Commission, however, has denied relief to Western Union (FCC 79-726), and the lawfulness of the Commission's action is subject to a petition for review now pending in the United States Court of Appeals for the District of Columbia Circuit. *Western Union Telegraph Co. v. FCC*, No. 80-1045.

11. As a consequence of the unlawful actions of the Bell System described in paragraphs 7 through 10, Western Union has been forced to pay excessive and unreasonable charges for facilities leased from the Bell System and to lease facilities from other carriers at higher rates than Western Union paid to the Bell System for the same or similar facilities under the Bell-Western Union contracts. In addition, Western Union has been forced to expand its own facilities, at substantial expense, to reduce the necessity for leasing Bell System facilities pursuant to the unlawful Bell tariffs. In some instances Western Union has been forced by the Bell System's unlawful actions to raise its rates to its own customers, which has resulted in loss of some customers and loss of substantial profits that otherwise would have been earned by Western Union on services provided to those customers. In all these respects, the Bell System's unlawful actions have damaged Western Union.

12. Western Union estimated, prior to expiration of the Bell-Western Union contracts, that the substitution of tariffed rates for the facilities leased under the Bell-Western Union contracts would result in increased charges amounting to $37 million annually, as applied to the existing complement of leased facilities (not including lease of foreign exchange, common control switching arrangements and domestic satellite service facilities). Because the complement of facilities leased

by Western Union under the contracts and the Bell charges for those facilities have changed since October 1, 1978, and may change again prior to decision on this Complaint, total overcharges cannot be estimated with any certainty at this time. Similarly, the amount of other damages incurred by Western Union cannot be calculated with certainty at this time.

13. Western Union has not filed any suit in another court requesting an award of money damages under Sections 208 and 209 of the Communications Act, 47 U.S.C. §§ 208, 209.

Wherefore, Western Union asks an award of money damages, pursuant to Sections 208 and 209 of the Communications Act, to indemnify Western Union for all losses sustained as a result of the Bell System's unlawful actions described herein, plus interest, and for such other and further relief as may be deemed appropriate.

Dated at Washington, D.C. this 30th day of September, 1980.

THE WESTERN UNION TELEGRAPH COMPANY

By .....
Wm. Warfield Ross
William R. Weissman

WARD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036

.....
Joel Yohalem

The Western Union
Telegraph Company
1828 L Street, N.W.
Washington, D.C. 20036

APPENDIX B

LAW OFFICES

WALD, HARKRADER & ROSS

1300 NINETEENTH STREET, N. W.
WASHINGTON, D. C. 20036

(202) 833-1300
CABLE ADDRESS: WALRUS
TELEX (RCA) 248891 (WUI)

DALLAS OFFICE

1800 ONE DALLAS CENTRE
DALLAS, TEXAS 75201
(214) 741-9241

SELMA M. LEVINE (1924-1975)
THOMAS C. MATTHEWS (1929-1979)

COUNSEL
CARLETON A. HARKRADER

OF COUNSEL
PHILIP ELMAN
DON WALLACE, JR.

CHARLES C. ADELES
TONI GOLDEN ALLEN
JERRY D. ANKER
GEORGE A. AVERY
MARSHALL BALL
DAVID R. BERZ
C. COLEMAN BIRD
RICHARD A. BROWN
THOMAS W. BRUNNER
DONALD T. BUCKLIN
ROBERT M. COHAN
AVRUM M. GOLDBERG
GREER S. GOLDMAN

DONALD M. GREEN
JOEL E. HOFFMAN
JUDITH RICHARDS HOPE
STEPHEN G. IVES, JR.
MARC E. LACRITZ
TERRY F. LENZNER
ROBERT M. LICHTMAN
C. WESTBROOK MURPHY
TERRENCE ROCHE MURPHY
DANIEL F. O'KEEFE, JR.
LEWIS M. POPPER
WM. WARFIELD ROSS
MARK SCHAITTNER

THOMAS J. SCHWAB
ROBERT A. SKITOL
STEPHEN M. TRUITT
THOMAS M. TRUITT
ROBERT L. WALD
KEITH S. WATSON
DAVID B. WEINBERG
WILLIAM R. WEISSMAN
JAMES DOUGLAS WELCH
GERALD S. WETLAUFER
STEVEN R. YABLONSKI
ANTHONY L. YOUNG

MARK H. BRAVIN
DEBORAH A. CALLOWAY
CHRIS J. CONAHAN
JOHN F. DALY
JAMES H. DAVIS
DAVID G. EPSTEIN
PATRICIA S. FELLNER
VAUGHAN FINN
D. MICHAL FREEDMAN
MARY GRAHAM
GILBERT E. HARDY

LESLIE A. HARRIS
LUCY REED HARRIS
EDWARD E. HONNOLD
SUSAN J. KASSELL
DANIEL L. KOFFSKY
FRAN M. LAYTON
JUDITH E. LESSER
JEFFREY F. LISS
JANE ELIZABETH LOVELL
MICHAEL D. LOWE
BRUCE J. PARKER
PRESIDENT PARTNER DALLAS OFFICE

GLORIA C. PHARES
BARBARA S. PRICE
CAREY R. RAMOS
JAY A. RESNICK
JANET W. ROBINS
PATRICIA G. SHARIN
RANDALL LEE SPECK
DEBORAH S. STANDIFORD
ANDREW J. STRENIO, JR.
ANN ADAMS WEBSTER

October 7, 1980

Mr. William J. Tricarico
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D. C. 20554

Re: Erratum notice
The Western Union Telegraph Company v. American Telephone and Telegraph Company and Bell System Operating Companies

Dear Mr. Tricarico:

On September 30, 1980, The Western Union Telegraph Company filed a formal complaint against the American Telephone and Telegraph Company and the Bell System Operating Companies. The purpose of this letter is to correct a typographical error in the complaint, as follows:

p. 3 paragraph 6

". . . the contracts expired on September 30, 1980"
should read
". . . the contracts expired on September 30, 1978."

Very truly yours,

William R. Weissman
Counsel for The Western Union
Telegraph Company

WRW/ew
cc: Philip Verveer, Esquire
Gerald E. Murray, Esquire

Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1687

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

MARJORIE S. REED
Acting General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

LISA B. MARGOLIS
Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
(202) 632-7112

QUESTION PRESENTED

Did the Court of Appeals err in finding that the Federal Communications Commission's decision to accept a rate filing was unreviewable where a statutory complaint procedure was available to ratepayers aggrieved by the new rates?

TABLE OF CONTENTS

	Page
Opinions below	2
Statement	2
Argument	2
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Aberdeen & Rockfish R. Co. v. *SCRAP*, 422 U.S. 289 (1975)	2
Aeronautical Radio, Inc. v. *FCC*, Nos. 77-1333, *et al.* (D.C. Cir. November 5, 1980), *cert. denied*, 49 U.S.L.W. 3789, (April 20, 1981), 49 U.S.L.W. 3825 (May 4, 1981)	3, 4, 5
Arrow Trans. Co. v. *Southern Ry. Co.*, 372 U.S. 658 (1968)	2, 5
Atchison, T. & S.F.R. Co. v. *Wichita B'd of Trade*, 412 U.S. 800 (1973)	2
Consolidated Rail Corp. v. *NARI*, 49 U.S.L.W. 3529, 449 U.S. —— (January 26, 1981)	3
Papago Tribal Utility Authority v. *FERC*, 628 F. 2d 235 (D.C. Cir.), *cert. denied*, 101 S. Ct. 784 (1980)	3, 4, 5
Southern Ry. Co. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979)	2, 3, 5
United States v. *ICC*, 337 U.S. 426 (1949)	2
United States v. *SCRAP*, 412 U.S. 669 (1973)	2

Statutes and Regulations:

Communications Act of 1934, 47 U.S.C. 151 *et seq.*: Sections 206-209, 47 U.S.C. §§ 206-209	5
28 U.S.C. § 2348	2

Miscellaneous:

D.C. Cir. R. 8(f)	4

PRECEDING PAGE WAS BLANK

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1687

THE WESTERN UNION TELEGRAPH COMPANY,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

The Federal Communications Commission respectfully asks the Court to deny the petition for a writ of certiorari filed by the Western Union Telegraph Company. Although the Solicitor General agrees that no question warranting further review has been presented, he is filing a separate brief because the Department of Justice had urged the Court of Appeals to reverse the Commission's order under review. The

Commission is represented by its own litigation counsel. 28 U.S.C. § 2348. See *United States* v. *ICC*, 337 U.S. 426 (1949).

OPINIONS BELOW

The January 13 order of the court of appeals (Pet. App. A) and the January 26 amending order (Pet. App. B) are not reported and will not be reported. The opinions and orders of the Federal Communications Commission are reported at 69 FCC 2d 724 (Pet. App. C) and 70 FCC 2d 1294 (Pet. App. D).

STATEMENT

The Commission accepts petitioner's statement as supplemented by the brief in opposition filed by the American Telephone and Telegraph Company (AT&T).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The petition presents no question that warrants this Court's review. The question of the propriety of the court of appeals' ruling on reviewability is readily resolved under the series of decisions of this Court which strictly limit an appellate court's authority to review agency decisions relating to the acceptance of tariff filings.

A consistent line of cases in tariff review matters establishes that appellate courts have no authority to determine the timing of carrier-initiated rate filings.[1] The court of appeals in this case acted con-

---

[1] E.g., *Arrow Trans. Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1968); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Atchison, T. & S.F.R. Co.* v. *Wichita B'd of Trade*, 412 U.S. 800 (1973); *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *Southern Ry. Co.* v. *Seaboard Allied*

sistently with that line of decisions and, more particularly, with this Court's reasoning in the 1979 *Southern Railway* case. *Southern Railway* held that a decision by the Interstate Commerce Commission not to investigate a tariff revision and thus to allow it to become effective—even in the face of allegations that the rates were patently unlawful—was unreviewable. Its reasoning was that such a decision was committed to the discretion of the agency and that complaint procedures remained available to allegedly aggrieved ratepayers.[2]

Recognizing that it would make little sense to declare orders concerning suspension and investigation unreviewable while permitting review of a related order to accept a rate filing, the D.C. Circuit in *Papago Tribal Utility Authority*[3] extended *Southern Railway* logically to find generally unreviewable an agency refusal to reject a carrier-initiated tariff.[4] And, applying the holding of *Papago*, that circuit has specifically declined tc review an FCC refusal to reject a tariff despite the absence of cost support data sufficient to satisfy the requirements of an agency regulation. *Aeronautical Radio Inc.* v. *FCC*, Nos. 77-1333, *et al.* (D.C. Cir. Nov. 5, 1980) *cert. denied*, 49 U.S.L.W. 3789 (April 20, 1981), 49 U.S.L.W. 3825 (May 4, 1981) (*ARINC*). Unpersuaded by

---

Milling Corp., 442 U.S. 444 (1979); *Consolidated Rail Corp.* v. *NARI*, 49 U.S.L.W. 3529, 449 U.S. —— (January 26, 1981).

[2] 442 U.S. at 454-63.

[3] *Papago Tribal Utility Authority* v. *FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 101 S. Ct. 784 (1980).

[4] *Id.* at 243.

arguments similar to those in the instant petition, this Court denied certiorari in both *Papago* and *ARINC*.[5]

The issue the court of appeals declined to review in the instant case (whether the FCC was obliged to reject because the carrier had not complied literally with threshold filing requirements) is the same issue that was present in both *Papago* and *ARINC*. In contrast to the dispute in *ARINC*, which involved tariff revisions of general applicability and which resulted in a substantial rate increase for a number of customers including the Department of Defense, all that is involved here is a transitory rate disagreement between AT&T and Western Union. And, unlike *ARINC* in which the court of appeals wrote a lengthy opinion, all that is at issue here is a one paragraph, unreported order which has no value as precedent. See D.C. Cir. R.8(f). Thus, this case is far less important than even *ARINC*.[6]

Petitioner accuses the court of appeals of improperly abdicating its judicial authority and asserts that it has made it clear that it will not review the FCC's refusal to reject a tariff filing regardless of the grounds of the decision or the irreparability of the injury (Pet. at 6). That argument overlooks the fact that in both *Papago* and *ARINC*, the D.C. Circuit recognized exceptions to the rule of unreviewability where the agency had disposed finally of a

---

[5] See 101 S. Ct. 784 (1980) and 49 U.S.L.W. 3789, 3825 (1981).

[6] The difference in the degree of the importance of the two cases is further illustrated by the fact that although the Solicitor General petitioned actively for certiorari in *ARINC*, he has not done so here.

substantive issue.[7] The unreported order in this case cannot subvert those exceptions.

Petitioner also argues that the statutory complaint remedy is inadequate to redress the injury it has incurred (Pet. at 11). It says that the Commission's refusal to reject the tariff has resulted in "irrevocable shifts in competitive relationships between the two companies" and it speculates that it will suffer a permanent loss of customers (Pet. at 11). However, an easy or certain road to relief is not a prerequisite to a finding of unreviewability under *Arrow Transportation.* As this Court noted in *Southern Railway*, "it was possible in *Arrow* . . . that nonreviewability would leave the aggrieved party without any judicial remedy at all." 442 U.S. at 459 n.12. In this case, Western Union does have the complaint remedy of the Communications Act, 47 U.S.C. §§ 206-209, which on its face does not preclude compensation of the type of injuries envisioned and which "alone suffices to render the FCC order non-final and unreviewable." *Aeronautical Radio, Inc.* v. *FCC, supra,* Nos. 77-1333, *et al.*, separate opinion on petition for rehearing, slip opinion at 4.

---

[7] See 628 F.2d at 244-45 and *Aeronautical Radio, Inc.* v. *FCC,* Nos. 77-1333, *et al.* (June 24, 1980), slip opinion as amended on rehearing (November 5, 1980) at 23-25.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MARJORIE S. REED
Acting General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOHN E. INGLE
Deputy Associate General Counsel

LISA B. MARGOLIS
Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
(202) 632-7112

MAY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 348009 350

Office-Supreme Court, U
FILED
MAY 19 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1687

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1687

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

---

1. Petitioner Western Union Telegraph Company ("Western Union") uses facilities provided by American Telephone and Telegraph Company ("AT&T") and its affiliated companies (collectively, "Bell") to supplement its own system in providing common carrier communications services throughout the United States, in competition with Bell. Prior to October 1, 1978, the Bell facilities were provided to Western Union pursuant to contractual arrangements.

During June and July of 1978, Bell filed with the Federal Communications Commission tariffs that would replace the contracts with rates that were approximately 150% higher. Although the FCC's Rules and Regulations require carriers to submit economic data to support all rate increases, 47 C.F.R. 61.38, Bell, by obtaining a waiver from the Commission, was excused from submitting such data.

Western Union unsuccessfully petitioned the Commission to reject the tariff filings, and then sought review in the United States Court of Appeals for the District of Columbia Circuit. The United States supported Western Union and argued that the Commission had abused its discretion by refusing to reject the tariff. The case was argued together with *Aeronautical Radio, Inc.* v. *FCC*, No. 77-1333 (D.C. Cir.). On November 5, 1980, the court of appeals ruled in *Aeronautical Radio* that the Commission's refusal to reject a tariff terminating AT&T's Telpak bulk rate for private line service was an unreviewable decision. Two months later, on January 13, 1981, the court dismissed Western Union's petition for review in a one-paragraph order. The Commission rate investigations that, in principle, encompass Western Union's claims have been dormant for four years (Pet. 4).

2. We continue to believe that the Commission abused its discretion in granting the waiver. Less than a month ago, however, this Court denied our petition for review of the court of appeals' holding that the Commission's refusal to reject the Telpak termination tariff, although not accompanied by supporting data, is unreviewable. *United States* v. *FCC*, No. 80-1408 (Apr. 20, 1981); see also *Aeronautical Radio, Inc.* v. *FCC*, No. 80-1343 (Apr. 20, 1981); *General Electric Co.* v. *FCC*, No. 80-1683 (May 4, 1981). As petitioner recognizes, the present case raises primarily the same issues as were involved in the *Telpak* cases. In light of the Court's action on those petitions, we cannot ask the Court to grant certiorari in this case.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

No. 80-1687

JUN 2
ALEXANDER L.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

WM. WARFIELD ROSS
WILLIAM R. WEISSMAN
BARBARA B. PRICE
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel of Record

JOEL YOHALEM
1828 L Street, N.W.
Washington, D.C. 20036
(202) 862-4600
Attorneys for The Western Union Telegraph Company

Of Counsel:
JOHN D. APPEL
The Western Union Telegraph Company
One Lake Street
Upper Saddle River,
New Jersey 07458

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES: Page

Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3789 (April 20, 1981), 49 U.S.L.W. 3825 (May 4, 1981) ..... *passim*

AT&T Offer of Facilities for Use by Other Common Carriers, 66 F.C.C.2d 1018 (1977) 3

Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800 (1973) 2, 3

Papago Tribal Utility Authority v. FERC, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. ——, 101 S.Ct. 784 (1980) 2

Western Union International, Inc. v. FCC, 568 F.2d 1012 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978) 3

STATUTES:

Communications Act of 1934, *as amended:*

Section 402(a), 47 U.S.C. § 402(a) 4

Section 415, 47 U.S.C. § 415 4

28 U.S.C. § 2342(1) 4

REGULATION:

47 C.F.R. § 61.38 (1980) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1687

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Despite obvious similarities, this case is not a clone of *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3789 (April 20, 1981), 49 U.S.L.W. 3825 (May 4, 1981) ("Aeronautical Radio"). The paramount issue in this case is the role of the courts in reviewing FCC acceptance of a Bell System rate filing that, on its face, violates substantive agency directives (not mere procedural tariff filing rules) and will result in immediate and substantial competitive injury. No such issue was presented in *Aeronautical Radio*.

Beyond that, this case presents the Court with a recurring pattern of agency misconduct that has an importance for the administrative process transcending the particular issues. Over a long period of time, the FCC has exercised its regulatory authority in this area of telecommunications in a manner that warrants review by this Court. As fully demonstrated in the petition for certiorari (Pet. 4, 12 n.19), the Commission has simultaneously (a) failed to investigate and act upon repeated

complaints by competitors challenging Bell's rate filings, (b) successfully warded off judicial review by assuring the Court that these complaints were still "pending" at the Commission, and (c) thereafter continued its "back-burner" policy of doing absolutely nothing in the way of investigation and resolution of the complaints. The decision below leaves the complainants helpless and without any legal remedy. This situation, we respectfully submit, is intolerable and should not be allowed to go unreviewed.

I.

Western Union pointed out in its petition that the tariffs filed by Bell were, on their face, wholly irreconcilable with the FCC's 1974 directive that Bell cease discriminating between its Long Lines Department and its competitors. *See* Pet. at 10. The FCC's duty to reject thus was mandated not merely by Bell's failure to "compl[y] literally with threshold filing requirements," such as 47 C.F.R. § 61.38,[1] but, more importantly, by its utter disregard of the substantive requirements of the FCC's non-discrimination policy. The precedent established by the Court of Appeals' refusal to review the FCC's decision goes far beyond *Aeronautical Radio*: it permits an agency to flout its own substantive policies and deprive those whom a policy was designed to protect of effective or timely redress.

The injury here is not merely substantial overcharges, as in *Aeronautical Radio* and *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. ——, 101 S.Ct. 784 (1980), but *irreparable* competitive injury. While the statutory complaint procedure may adequately protect the interests of customers, as in *Aeronautical Radio* and *Papago*, it is wholly inadequate to protect the interests of competitors. *See Atchison, Topeka & Santa Fe Railway v. Wichita Board of*

[1] *See* Brief of the Federal Communications Commission in Opposition ("FCC Opp.") at 4.

Trade, 412 U.S. 800, 824 n.17 (1973) (plurality opinion). That consideration is particularly important in this case where the party filing the increased rates—the Bell System—dominates the telecommunications industry and the party that must bear the full brunt of the higher rates—Western Union—is the only carrier competing with the Bell System nationwide in offering the services affected by the new rates. This petition thus presents questions that go beyond mere rate regulation, as in *Aeronautical Radio.*

II.

For four years, Western Union and other carriers have sought administrative review of the lawfulness of these rates without success. Repeatedly, the Commission has promised to investigate these rates,[2] but other than its adoption of an order in 1977 formally opening an investigation,[3] the Commission has allowed the investigation to remain dormant since that time. Now, without having done anything to advance the investigation and without challenging the contention in our petition that "in all probability [the investigation] will continue to be totally inactive indefinitely" (Pet. at 12 n.19), the Commission describes this case as involving nothing more than "a transitory rate disagreement" (FCC Opp. at 4).

---

[2] The Commission first promised to investigate the rates involved here in 1977, even before AT&T sought to apply them to Western Union. That promise was uttered on the eve of oral argument in *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978), and the Second Circuit relied upon the promise in affirming an FCC order permitting AT&T to apply the rates to several international telegraph carriers. *See* 568 F.2d at 1014. A similar promise was made in the order here for review. *See, e.g.*, Pet. App. 22a, 23a, 28a. At oral argument in the Court of Appeals more than two years ago, Commission counsel in this case, responding to a question from the bench, advised the court that it could reasonably assume that the "pending" rate investigation, though dormant at the time, would be concluded in one to two years.

[3] *AT&T Offer of Facilities for Use by Other Common Carriers*, 66 F.C.C.2d 1018 (1977).

In light of four years of inaction, the FCC should not be heard to contend that "the complaint remedy" protects Western Union from the competitive injury it has been suffering and will continue to suffer. *See* FCC Opp. at 5. There is no reason to credit the Commission's implied promise to act on rate complaints, given its failure to investigate the challenged rates despite its promises to do so. In short, absent judicial intervention, there will be no investigation and no action on Western Union's September 1980 complaint.[4]

The decision below leaves a gaping hole in the statutory scheme, which contemplates effective (and therefore timely) judicial review of the Commission's ratemaking orders. As noted in our petition, the FCC has not in recent history used its investigation and prescription authority to control Bell rates. It has merely accepted some Bell filings and rejected others. *See* Pet. at 7-9. Thus, the decision whether to accept or reject is critical. Since Congress did not delegate unreviewable ratemaking discretion to the FCC,[5] the Commission should not be free to insulate critical ratemaking orders from judicial review, at least in this instance, where more than mere overcharges are involved.

The problem of FCC inattention to its statutory duties was not presented in the several ICC cases or the recent *Aeronautical Radio* case on which the Commission relies. To be sure, the rates for Bell's Telpak services at issue in *Aeronautical Radio* had been disputed for more than

---

[4] Western Union's complaint, which merely tracks its previous attack on these rates, was filed to avoid any possibility that its claims might be barred by the statute of limitations in 47 U.S.C. § 415. The implication in AT&T's brief in opposition that our complaint acknowledges the workability of the complaint remedy (AT&T Opp. at 2, 6) is without foundation.

[5] *See* Communications Act § 402(a), *as amended*, 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).

20 years without a final FCC decision, but none of the petitioners for certiorari had been prejudiced by that delay, nor were they complaining of it. By contrast, this case squarely presents the important question of whether the FCC (or any other agency) should be allowed to invoke the rule of non-reviewability articulated by the Court of Appeals in *Aeronautical Radio* and by this Court in decisions under the Interstate Commerce Act where the end result is to permit the agency to disregard its fundamental ratemaking responsibilities.

CONCLUSION

The Solicitor General "cannot ask the Court to grant certiorari in this case" because of a belief that the denial of certiorari in *Aeronautical Radio* portends a similar action here. As has been shown, however, this case presents reasons for review that were absent from those cases.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WM. WARFIELD ROSS
WILLIAM R. WEISSMAN
BARBARA B. PRICE
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel of Record

JOEL YOHALEM
1828 L Street, N.W.
Washington, D.C. 20036
(202) 862-4600
Attorneys for Petitioner

Of Counsel:
JOHN D. APPEL
The Western Union
Telegraph Company
One Lake Street
Upper Saddle River,
New Jersey 07458

June 2, 1981